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THE INDIAN SUCCESSION ACT

BEING

ACT NO. XXXIX OF 1925

(AMENDED UP-TO-DATE)

BY

PESTONJEE LIMJEE PARUCK, B. A., LL. M.

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Author of Commentary on "Arbitration Act."

THIRD EDITION

(Revised and brought up-to-date)

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FOREWORD TO SECOND EDITION

BY SIR SAJBA S. RANGNEKAR, KT.

Lately Judge of the High Court of Judicature, Bombay.

It is with pleasure that I accept Mr. Paruck's invitation to me to write a foreword to his work on the consolidated Indian Succession Act, 1925. It is beyond dispute that the Act is one of the most important on the statute book, governing as it does the testamentary and intestate succession in British India, and is applicable to almost all communities in this country. There were formerly many separate enactments relating to succession and, as is well known, the law therein contained was difficult of easy ascertainment. The present Act is, as the framers say, an attempt to consolidate the law, and the proper and correct interpretation of the principles laid down in it is a matter of every day concern not only to the lawyers but also to the lay public. A well conceived, critical yet brief and lucid commentary on the sections of the Act, therefore, is not without its use, and one such will, in my opinion, be found by the reader in the book which Mr. Paruck has brought out. The fact that the work has passed through earlier editions, shows that there is a keen demand for such a book. The learned author has not lost sight of the fact that the Act is a Consolidating Act and has endeavoured to preserve and apply so much of the store of legal decisions as seems to be still applicable.

I most gladly testify my high appreciation of the work and have no doubt that, taken as a whole, it is one of the best books on the subject for students and lawyers and may also be used with advantage by the lay public.

8th March 1939.

S. S. RANGNEKAR.

PREFACE TO THE THIRD EDITION

Eight years have elapsed since the last edition of this work on the Indian Succession Act was published. Although the edition was exhausted some years ago, it was not then possible to bring out another edition owing to the exigencies of war and the shortage of paper.

The long lapse of time between the previous edition and this has meant the incorporation of a large number of important decisions which in some cases have altered the law as previously understood. While the book was in press the Privy Council decided the case of *Sopher v. Administrator-General of Bengal* (1944) 71 I.A. 98, the effect of which is undoubtedly disastrous to the validity of many trusts made for the benefit of unborn persons. This case has been dealt with in the commentaries under sec. 113 of the Act. In fact this decision has so upset the equanimity of conveyancers that an attempt to supersede the decision was made in the Central Legislature by a Bill which was published in the Gazette of India, 16th February 1946, Part V, page 92 and by another Bill which apparently is pending before the Legislature of the Province of Bombay and is published in the Bombay Government Gazette of 28th August 1946 in Part V at p. 146. These bills appear to have been drafted in haste and have not found favour so far either with the Central Legislature or the local Legislature in the Province of Bombay. Another important decision is the judgment of Chagla, J. of the Bombay High Court, which has now been reported in the Bombay Law Reporter (1946) at p. 642 (*Ashrafali v. Mahomedali*.) This decision also was given while the book was in press and although it has been dealt with in its appropriate place, the late report of the case made it impossible to give a reference to the report in the commentary. The decision deals with the question whether the will of a Khoja should be construed by Hindu or by Mahomedan Law. Other important decisions have been referred to in their appropriate places.

The Indian Succession Act of 1865 was passed almost a century ago and was based on the English law then prevailing. From time to time enactments such as the Hindu Wills Act, and Probate and Administration Act were passed and all the legislations with regard to succession were ultimately consolidated and a comprehensive Indian Succession Act was passed in 1925. In 1937 the Government of India Act came into operation, and in 1939 the Central Legislature purported to repeal the provisions relating to the Parsi Intestate Succession Act and substituted the other provisions by Act VII of 1939. The validity of this legislation in so far as succession to agricultural property is concerned is open to doubt and as explained in the commentaries the position has become anomalous. It is also to be noted that the English law on which the Indian Succession Act was originally based has undergone drastic changes. The most important statutes are the Administration of Estates Act (15 Geo. V c. 28) and the Law of Property Act (15 Geo. V c. 20). Under the Inheritance (Family Provision) Act of 1938 (1 & 2 Geo. VI c. 45) it is no longer possible for a testator to will away his property to an outsider leaving his dependants wholly penniless. This is a statutory enactment which may well find favour with the Indian Legislatures.

It is respectfully submitted that it is high time that the Government of India should undertake complete revision of the law of Succession, and the opportunity should be taken not only to remove the doubts but also to alter the law so that it may be in conformity with modern requirements.

January }
1947 }

P. L. P.

PREFACE TO THE SECOND EDITION

Since the publication of the first Edition of this Book in 1926 the Indian Succession Act has been amended by several amending Acts as well as by the Government of India (Adaptation of Indian Laws) Order, 1937. There have also been numerous decisions of the Judicial Committee of the Privy Council and of the various High Courts of India on the interpretation of several sections of this Act. The amendments by the Legislature and by the Order in Council and the new case law have effected numerous and far reaching changes in the law of succession in India. The English Law on which the Indian Succession Act of 1865 was mainly based has also undergone very vital changes due to the Administration of Estates Act, 1925 (Statute 15 Geo., 5, c. 28) and the Law of Property Act, 1925 (15 Geo., 5 c. 20).

The cases and in particular Privy Council decisions as reported upto date have been carefully considered and incorporated in this Edition. The old English Law and the changes that have taken place are pointed out in their appropriate places.

Whilst this book was in print, an important Bill (Bill No. 10 of 1935) was introduced in the Bombay Legislative Assembly to provide that the dispositions or bequests in favour of charity, religious purposes, or purposes of public utility shall not fail on the ground of vagueness or uncertainty by the use of the expressions Dharam, Dharmada, Sara Kam, etc. This bill is published in the Gazette of India of 7th September 1938, part II at p. 310. On this subject while the book was in print an important decision has been given by the Honourable Mr. Justice Somjee in *Hussein Abdul v. Gulibai Noormahomed* that a bequest "for the good and benefit" of Khoja Sunnat Jamat was a valid charitable gift. The decision has not yet been reported.

The first Edition of this book was useful to the law students and it is hoped that this Edition will be found equally helpful to them. Although this Edition has been considerably enlarged, the author has tried to explain the different sections in as clear a language as possible so as to be readily understood by the students. Several important sections and cases have been analysed so as to assist them in their studies.

In the index of cases cross references have been given of the law reports in which the decisions are reported. The general index has also been very carefully revised and cross-references given to enable practitioners to find out immediately the proper page of reference on any point involved.

For his courtesy in contributing a Foreword to this Edition the author begs to express his deep obligation to the Sir Sajba S. Rangnekar, Ex-Judge of the Bombay High Court.

STATEMENT OF OBJECTS AND REASONS.

The object of this Bill is to consolidate the Indian Law relating to succession. The separate existence on the Statute-book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it.

The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made. The details of the Bill are more particularly discussed in the attached Notes on Clauses.

A. P. MUDDIMAN.

President, Statute Law Revision Committee.

Date 21st July 1923.

NOTES ON CLAUSES.

Clause 2.—The General Clauses Act, 1897, (X of 1897), will apply to the Bill. The definitions therefore of “person,” “year,” “month,” “immoveable property,” “moveable property,” “Local Government” and “High Court” are unnecessary and are omitted. The definitions of “British India” and “District Judge” have also been omitted as the definitions in the General Clauses Act appear more suitable and do not change the substance of the law. The definition of “Province” has been omitted, as, notwithstanding the ruling in 12 W.R. 424, it does not appear that the omission will lead to any administrative inconvenience. The definition of “minor” and “minority” is adopted from section 3 of the Probate and Administration Act, 1881 (V of 1881), and seems appropriate to the consolidated Bill. No change has been made in the other definitions which are taken from Act X of 1865, though one or two could perhaps have been more suitably worded. The definition of “Indian Christian” is taken from the Native Christian Administration of Estate Act, 1901 (VII of 1901), except that the phrase “Indian Christian” has been used instead of “Native Christian” following the modern practice in this respect.

Clause 3.—This is based on section 332 of the Indian Succession Act, 1865 (X of 1865), but in the consolidated Bill it is necessary to confine its operation to those provisions which are derived from that Act. The use of the term “exempted person” is a drafting device which enables the language of the Bill to be shortened.

Clause 4.—The second proviso to this clause is taken from the last paragraph of section 2 of the Married Women’s Property Act, 1874 (III of 1874). This provision comes in appropriately here and it is proposed to repeal the corresponding provision in the Act in question.

Clause 5.—It is well settled that the word “Hindu” in section 331 of the Indian Succession Act, 1865, and in section 2 of the Probate and Administration Act, 1881, includes Jainas and Sikhs (*cf.* I.L.R. 31 Cal. 11, etc.) and as the Hindu Wills Act, 1870, which the Bill consolidates, makes special mention of Sikhs and Jainas they are separately mentioned throughout the Bill. This and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill, which has just been passed by the Indian Legislature, becomes law.

Clauses 6 to 20 deal with domicile and are reproductions of the corresponding sections of the Act of 1865. They are for the most part general rules which might

well be applicable to all classes, but clause 5, reproducing section 331 of the Act of 1865, excludes their application in the case of Hindus, Muhamadans, Buddhists, Sikhs and Jains.

Part III deals with intestate succession and is based on the appropriate provisions of the Indian Succession Act, 1865 (X of 1865) and the Parsi Succession Act, 1865 (XXI of 1865.)

Clauses 46 to 52 and Schedule II contain special rules as to intestate succession among Parsis.

Clause 53.—The proviso to this clause gives effect to one of the provisions of section 8 of the Parsi Succession Act and, taken together with the preceding clauses reproduces the whole of that Act, which it is therefore proposed to repeal.

Part IV deals with testamentary succession.

Clause 56, read with Schedule III, reproduces those provisions of the Hindu Wills Act, 1870 (XXI of 1870), which relate to testamentary succession. Section 187 of the Indian Succession Act, 1865 (X of 1865), as applied by the Hindu Wills Act, has been dealt with in another part of the Bill and will be dealt with under the appropriate clause.

Part V deals with protection of the property of the deceased. It is largely based on the Succession (Property Protection) Act, 1841 (XIX of 1841). This Act was framed under the old system of drafting and certain slight verbal changes of language have had necessarily been made in introducing its provisions in the consolidated Bill, but reference will be made under the appropriate clauses to all changes which are other than purely verbal.

Clause 196.—This clause is taken from section 23 of the Succession Certificate Act, 1889 (VII of 1889), but which, as it limits the power of the curator, appropriately falls in this Part of the consolidated Bill.

Clause 197.—The words “moveable” and “immoveable” have been substituted for the words “personal” and “real.”

Clause 198.—The words “High Court” have been substituted here and in other places in this Part where they occur for the words “Court of Sadar Diwani Adalat.”

Clauses 204, 205 and 206.—These clauses have been recast as they are drawn in a form which is no longer employed in modern Acts.

Part VI.—This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this manner, the consolidation of those provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act, 1865 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881), are rendered possible.

Clause 210.—This reproduces the important section 190 of Act X of 1865 which requires that no right to any part of the property of a person who has died intestate can be established in any Court without letters of administration. The very important qualification which excludes the operation of this section in the case of the intestacy of Hindus, Muhammedans, Buddhists, Sikhs, Jains and Indian Christians is based on section 331 of Act X of 1865 and section 8 of Act VII of 1901.

Clause 211 reproduces the corresponding important provision in the case of testate succession contained in section 187 of Act V of 1865 with the important

qualification provided for by section 331 of Act X of 1865 and with the application of section 187 of Act X of 1865 read with section 2 of the Hindu Wills Act, 1870 (XXI of 1870).

Clause 212 reproduces the provisions of section 4 of the Succession Certificate Act, 1889 (VII of 1889).

Clause 213.—This clause is intended to reproduce the effect of section 152 of the Probate and Administration Act and section 21 of the Succession Certificate Act, and appears to come in appropriately under this Part of the Bill since it deals with the substitution of the title of the grantee for that of the certificate holder.

With reference to this Part of the Bill, it will be observed that the arrangement of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person.

Part VII.—The provisions of the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act, 1865 (X of 1865), and the Probate and Administration Act, 1881 (V of 1881). Those sections of the Succession Act which deal with representative title have already been disposed of by the preceding Part of the Bill and with those exceptions the provisions of the two Acts on the subject are with comparatively small differences identical. This part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate clauses such special exceptions which are necessitated in order that the existing law may be reproduced.

Clause 215 reproduces section 179 of Act X of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by section 4 of Act V of 1881.

Clause 218.—As in the case of Hindus, Muhammedans, Buddhists, Sikhs, Jains and exempted persons, probate can be granted to a married woman without the consent of her husband, the provisions of section 8 of Act V of 1881 are here incorporated with those of section 183 of Act X of 1865.

Clause 223.—Here, again, section 18 of Act V of 1881 is incorporated with section 189 of Act X of 1865 for the same reason.

Clauses 233 and 234.—The right to the grant of administration is dealt with by section 28 of Act V of 1881 and by sections 200 to 207 of Act X of 1865. Clause 233 reproduces the former rule and clause 234 the latter.

Clause 239.—Section 212 of the Act of 1865 uses the word “attorney”. Section 28 of the Act of 1881 uses the word “agent.” Both words are used in the consolidated Bill.

Clauses 240 and 241.—The same remarks apply as in the case of clause 239.

Clause 242.—In view of the wider scope of the Bill, the language of section 31 of the Act of 1881 has been followed, *i.e.*, the words “had attained his majority” have been substituted for the words “shall have completed the age of 18 years.”

Clause 244.—Section 217 of the Act of 1865 does not deal with the case of minors. Section 33 of the Act of 1881 does. As it appears to be merely *casus omissus* and the provision is in accordance with actual practice, the language of section 33 of the Act of 1881 has been adopted.

Clause 246.—The same remarks apply as in the case of clauses 240 and 241.

Clause 247.—Curiously enough both section 36 of the Act of 1881 and section 226 of the Act of 1865 use the word “attorney”. It would appear a drafting slip in the Act of 1881 and the words “or agent” have been added.

Clause 248.—The language of section 37 of the Act of 1881 has been adopted, but there is no change in the substance.

Clause 262.—The proviso incorporates the provisions of section 2 of the Act of 1881.

Clause 269.—Sub-section (2) incorporates the provision of section 3 of Act VII of 1901 as the provision is not incorporated in the Act of 1881, it excludes the person to whom that Act relates from the purview of the clause.

Clause 274.—The law to be reproduced is contained in section 244 of the Act of 1865 and section 62 of the Act 1881. The latter Act, however, contains the additional words “or for letters of administration with will annexed” and also the words “or in the cases mentioned in sections 24, 25 and 26 a copy, draft or statement of the contents thereof”. The provisions of the Act of 1881 seem necessary to complete the law and they have been adopted *mutatis mutandis* in the clause.

Clause 275.—Similarly the words “copy of draft” which only occur in section 63 of the Act of 1881 have been adopted.

Clause 276.—This clause is based on section 246 of the Act of 1865 and section 64, Act V of 1881. Here again there is a discrepancy between the two sections. Under section 246 a petition must state that the deceased left some property within the jurisdiction of the District Judge or District Delegate to whom the application is made. Under section 64 in the case of an application to a District Judge the petition must state either that the deceased at the time of his death had a fixed place of abode or had some property situate within the jurisdiction of the Judge. The Bill follows the language of section 246. As a slight change in the law is involved attention is drawn to the point, and similarly to the fact that the words “a fixed place of abode” are used in the Bill in this clause also in order that the wording of the clause may be consistent with the wording of clause 274. Furthermore, although section 244 requires in the case of an application to a District Judge that the petition should state that the deceased had “his fixed place of abode” within the jurisdiction of the Judge, that section in the case of an application to a District Delegate requires that the petition shall state that the deceased “resided” within the jurisdiction of the Delegate. This discrepancy is apparently explained by the fact that the paragraph was inserted by the District Delegates Act, 1881 (VI of 1881). Section 62 on the contrary uses the phrase “fixed place of abode” in both places. It seems doubtful whether it is necessary to maintain the discrepancy in the language of section 244 and the Bill uses “fixed place of abode” in both places, but it seems that attention should be drawn to the point.

Clause 289.—The proviso embodies the different rules provided by section 78 of the Act of 1881.

Clause 295.—This reproduces section 333 of Act X of 1865 and section 157 of Act V of 1881 which are in identical terms. These sections were added in their respective Acts by Section 17 of Act VI of 1889 and are obviously out of position in those Acts.

Clause 299.—The proviso embodies the provisions in that behalf in section 2 of Act V of 1881.

Clause 302.—This clause is necessary as the provisions of the Act of 1865 relating to “executors of their own wrong” were not included in the Act of 1881.

Clause 305.—The wording of section 88 of the Act of 1881 has been adopted. It is more in consonance with the language of the Indian draftsman and involves no change of substance.

Clause 307.—Sub-section (2) reproduces the provisions of section 90 of the Act of 1881 which were inserted in that Act by section 14 of Act VI of 1890.

Clause 311.—The words “in the absence of any directions to the contrary in the will or grant of letters of administration” which occur in section 93 of the Act of 1881 have been adopted in the clause as they appear to state the law more accurately.

Clause 316.—The wording of section 97 of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance.

Clause 324.—This reproduces section 283 of the Act of 1865. Neither this section nor section 284 has a corresponding provision in the Act of 1881. Sub-clause(3) therefore, excludes from the operation of the clause those to whom the Act of 1881 applies.

Clause 327.—Here again the wording of section 107 of the Act of 1881 has been adopted as it states the law more accurately.

Clause 322.—This corresponds to section 292 of the Act of 1865 which is the first section in Part XXXV of that Act which is headed “Of the Executor’s Assent to a Legacy.” This at once raises the question of section 148 of the Act of 1881. That section runs as follows : “In Chapters VIII, IX, X and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed.” These Chapters deal with (1) the executor’s assent to a legacy, (2) the payment and apportionment of annuities, (3) the investment of funds to provide for legacies and (4) the refunding of legacies. They correspond to Parts XXXV, XXXVI, XXXVII and XXXIX of the Act of 1865 but that Act contains no specific provision of the kind contained in section 148. To take the first question, the executor’s assent to a legacy, it would seem that the executor and the administrator with the will annexed are in exactly the same position. The reason, the assent of the executor is necessary, is that the estate of the deceased is vested in the executor and the legatee’s title to the legacies is only inchoate. Equally this is true of the administrator with the will annexed. It would seem, therefore, that under the Indian Succession Act the assent of an administrator with the will annexed to a legacy is probably necessary though no specific provision exists. It is well settled law in England that this is so, see *Doe v. Mobberley*, 6 C. and P. 126, *Broker v. Charter*, Cro. Eliz. 92. Similarly the other provisions specifically mentioned in section 148 appear to be applicable to cases under the Indian Succession Act. The Bill has been drafted to give effect to this view by specific amendments.

Clause 345.—This reproduces section 305 of the Act of 1865, but, as the provision does not occur in the Act of 1881, the proviso inserted is necessary.

Clause 360.—This clause reproduces section 320 of the Act of 1865 and section 139 of the Act of 1881. It would be preferable if the wording of section 139 had been adopted, but this would involve a slight change in the law.

Clause 370 is based on section 1 (4) of the Succession Certificate Act, 1889 (VII of 1889), with the exception in the proviso which is based on section 5 of Act VII of 1901. The effect of the section here reproduced is apparently that succession

certificate cannot be granted in a case where the law requires probate or letters of administration to establish a representative title before the Court. In cases where letters of administration or probate are not essential, *i.e.*, cases falling within the Act of 1881, a certificate can apparently be granted. The clause is based on this view of the law.

Clause 371.—In this clause and the rest of this Part, the words “District Judge” have been used in order to assimilate this Part to the rest of the Bill.

L. GRAHAM.

Officiating Secretary to the Government of India.

REPORT OF THE JOINT COMMITTEE.

The following Report of the Joint Committee on the Bill to consolidate the law applicable to intestate and testamentary succession in British India was presented to the Council of State on the 25th August, 1925 :—

We, the undersigned, Members of the Joint Committee to which the Bill to consolidate the law applicable to intestate and testamentary succession in British India was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

Paper No. I.	
Paper No. II.	
Paper No. III.	
Paper No. IV.	
Paper No. V.	

The Committee met on 30th June, the Honourable Sir Henry Moncrieff Smith, President of the Council of State, being elected Chairman. Further sittings were held on the 1st, 3rd and 4th July, the following members being present in addition to the Chairman :—

The Honourable Sir NARASIMHA SARMA,
 The Honourable Sir ALEXANDER MUDDIMAN,
 The Honourable Saiyid RAZA ALI,
 The Honourable Sir DEVA PRASAD SARVADHIKARY,
 The Honourable Sir ARTHUR FROOM,
 Rai Sahib HARBILAS SARDA,
 Mr. K. C. NEOGY, and
 Mr. ABDUL HAYE.

A final meeting was held on the 17th August to consider the redraft of the Bill at which Diwan Bahadur M. Ramchandra Rao also was present.

2. Many of the opinions elicited on circulation of the Bill involve amendments of the existing law and this, in our opinion, is outside the scope of the Bill which has been referred to us. The Bill is purely a consolidating Bill and some of those who have submitted opinions have clearly treated it as such, and it would not be advisable, or within our competence, for us to consider amendments of the existing law in connection therewith. The papers which we have considered, however, indicate that there is a considerable volume of opinion in favour of amending the existing law and we invite the attention of the Government to this fact.

3. Suggestions have been made for the inclusion of the undermentioned enactment in this Bill, but for the reasons hereunder given we are not of opinion that these should be consolidated with the present Bill.

The Hindu Disposition of Property Act, 1916—As only a part of the Act relates to succession, the consolidation of this portion alone would not simplify the Statute Book, as section 5 of the Act cannot suitably be included in the amending Bill, and this section requires that the provisions of the Act relating to succession should continue to be enacted therein.

The Special Marriages (Amendment) Act, 1923.—The principal Act is of special application and it is advisable that even the rules of succession applicable to persons who marry under that Act should be enacted in the special Act which deals with the status of such persons.

The Wills Act, 1838, and the Inheritance Act, 1839.—These relate only to wills and intestacies occurring before the 1st January, 1866, and in all probability will be spent at an early date.

The Legal Representative Suits Act, 1855.—This cannot wholly be included in the consolidating Bill; the provisions of the Act are substantially reproduced in the Bill, but we have decided *ex majori cautela* not to repeal the provisions of this Act.

We agree with the Statute Law Revision Committee that it would be difficult to incorporate the provisions of the *Indian Fatal Accidents Act, 1855*, in the consolidated Bill.

The Oudh Estate Act, 1869, and the Malabar Wills Act, 1898.—These are enactments of local interest which would not properly find a place in a general consolidating enactment. This applies also to Bombay Regulation VIII of 1827.

4. The following notes on clauses explain the amendments which we have made in the Bill.

Clause 2.—It has been pointed out that the omission of the definition of “province” given in the Indian Succession Act, 1865 (and the consequent application of the definition given in the General Clauses Act, 1897), does alter the existing law. We have, therefore, inserted in new clause (g) the original definition.

Clause 3 (1).—This has been brought into line with the provisions of section 332 of the Indian Succession Act, 1865, which operate from the date stated.

New Part III.—Original clauses 54 and 55 have been taken out of original Part IV and, with original clause 4, formed into a new Part dealing with the effect of marriage on rights of succession.

Part IV, clauses 23 to 28.—We have taken the clauses relating to consanguinity from original Part III (intestate succession) and formed them into a separate Part, new Part IV, as in Act X of 1865. The operation of these clauses is not limited to cases of intestate succession.

Clause 35.—We are of opinion that the provisions relating to the rights of a widower are more appropriately inserted here.

Clause 38.—*Illustration (c)* has been transferred to clause 40 as illustration (d), as the illustration properly relates to that clause.

Clause 99.—We have amended this clause to express the meaning more clearly.

Clause 111.—We have omitted *Illustration (b)* as it might give the impression that a child in the womb is excluded which is not the existing law.

Parts VII and VIII.—The amendments made are purely drafting amendments. Original clause 215 has been inserted in Part VIII as clause 211 and original clause 298 as clause 216 as they deal with the question of representative title. In clause 214 (1)(a) and in the heading to the Part we have added the words “on succession” as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law.

Clause 217.—We have amended the clause to make it clear that it refers to intestate as well as testamentary succession.

Part IX, Chapter I.—We have re-arranged the provisions in the following order: (1) administration in case of intestacy, (2) probate, (3) letters of administration.

In the Vernacular.

<i>Province.</i>					<i>Language.</i>					<i>Date.</i>
Madras	...	...	...	...	Tamil	...	...	...	...	22-4-24
					Telugu	...	...	...	...	12-8-24
					Hindustani	...	...	...	...	11-3-24
					Kanarese	...	...	...	...	30-9-24
					Malayalam	...	...	...	...	14-10-24
Burma	...	...	...	...	Oriya	...	...	...	...	15-7-24
					Burmese	...	...	...	...	24-11-23

6. We think that the Bill has not been so altered as to require re-publication. We do not suggest that the final passing of the Bill should be delayed till an amending Bill generally overhauling the law of succession has been introduced and taken through the Legislature. This would very considerably delay the passage of the present Bill, which as a purely consolidating measure should prove of great utility, and we recommend that it be passed as now amended.

H. MONCRIEFF SMITH.

B. N. SARMA.

A. P. MUDDIMAN.

DEVAPRASAD SARVADHIKARY.

RAZA ALI.

A. H. FROMM.

HARBILAS SARDA.

K. C. NEOGY.

ABDUL HAYE.

M. RAMACHANDRA RAO.

The 21st August, 1925.

STATEMENT OF REPEALS AND AMENDMENTS

SECTIONS.

2 amended	..	..	..	..	Act XVIII of 1929, s. 2.
3 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
10 amended		..	..	..	Act X of 1927, s. 2 & Sch. I. Act XXXV of 1934, s. 2 & Sch. The Government of India (Adaptation of Indian Laws) Order, 1937.
11 amended	..	..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
33 amended		..	..	..	Act XL of 1926, s. 2.
33A inserted		..	..	..	Act XL of 1926, s. 3.
50, 51, 52, 53, 54, 55 & 56 substituted				..	Act XVII of 1939, s. 2.
57 amended	..	..	..	..	Act XVIII of 1929.
63 amended	..	..	..	..	Act X of 1927, s. 2 and Sch. I.
65 amended	..	..	..	..	Act X of 1927, s. 2 and Sch. I.
66 amended		..	..	..	Act X of 1927, s. 2 and Sch. I.
115 & 116 amended			..	..	Act XXI of 1929, s. 14.
117 substituted		..	..	..	Act XXI of 1929, s. 14.
142 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
150 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
157 amended		..	..	..	Act X of 1927, s. 2 & Sch. I.
158 & 159 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
163 amended	..	..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
172 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
191 amended	..	..		..	The Government of India (Adaptation of Indian Laws) Order, 1937.
210 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
218 amended		..	..	..	Act XVIII of 1929, s. 4.
228 amended		..	..	..	Act XVIII of 1927, s. 2. The Government of India (Adaptation of Indian Laws) Order, 1937.
236 amended		..	..	..	Act XVIII of 1927, s. 2. The Government of India (Adaptation of Indian Laws) Order, 1937.
264 & 265 amended	..	..		..	The Government of India (Adaptation of Indian Laws) Order 1937.
273 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
294 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
300 amended		..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
370 amended		The Government of India (Adaptation of Indian Laws) Order, 1937.

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372 amended	Act XIV of 1928, s. 2.
380 amended	The Government of India (Adaptation of Indian Laws) Order, 1937.
388 amended	..	..	..	The Government of India (Adaptation of Indian Laws) Order, 1937.
392 repealed	..	..	..	Act XII of 1927, s. 2 and Sch.
Sch. II substituted	..	..	..	Act XVII of 1939, s. 3.
Sch. III amended	Act XXI of 1929, s. 14.
Sch. IX repealed	Act XII of 1927, s. 2 and Sch.

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THE INDIAN SUCCESSION ACT

BEING

Act No. XXXIX of 1925

[RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE
30TH SEPTEMBER 1925].

(*An Act to consolidate the law applicable to intestate and
testamentary succession in British India*).

Preamble. WHEREAS it is expedient to consolidate the law applicable to
intestate and testamentary succession in British
India; it is hereby enacted as follows:—

The preamble makes it clear that the Act is only intended to apply to
matters of succession. It does not apply to any matters other than those connect-
ed with intestate and testamentary succession. Questions of domicile are treated
in Part II. Sec. 11 lays down a special mode of acquisition of domicile. But that
mode is for the purpose of succession only and not for other purposes, *e. g.*, divorce
proceedings(a). For interpretation of preamble see Maxwell on the Interpretation
of Statutes 8th Edn. p. 40.

PART I.

Preliminary.

Short Title. 1. This Act may be called the Indian Succes-
sion Act, 1925.

This Act is a consolidating Act and the following Acts have been con-
solidated into this Act and in consequence they are wholly repealed.

- (1) The Succession (Property Protection Act) Act XIX of 1841.
- (2) The Indian Succession Act X of 1865.
- (3) The Parsi Intestate Succession Act XXI of 1865.
- (4) The Hindu Wills Act XXI of 1870.
- (5) The Married Women's Property Act III of 1874, S. 2.
- (6) The Probate and Administration Act V of 1881, Act VI of 1889,
Act II of 1890, and Act VIII of 1903.
- (7) The District Delegates Act VI of 1881.
- (8) The Succession Certificate Act VII of 1889.
- (9) The Native Christian Administration of Estates Act VII of 1901.

Several new sections have been added to the Indian Succession Act X of
1865 and the changes effected will be pointed out in their appropriate places.

Suggestions were made for the inclusion of the undermentioned Acts but
the Joint Committee was of opinion that they should be left out.

- (1) The Hindu Disposition of Property Act, 1916.
- (2) The Special Marriage (Amendment) Act, 1923.
- (3) The Wills Act, 1838, and the Inheritance Act, 1839.
- (4) The Legal Representative Suits Act, 1855.
- (5) Indian Fatal Accidents Act, 1855.
- (6) The Oudh Estates Act, 1869.
- (7) The Malabar Wills Act, 1898.

Amendments.—Since the passing of the Act, it has been amended by the following Acts.

- (a) Act XXXVII of 1926 which amended sec. 57 and applied sec. 63 to the Wills of Hindus, Buddhists, Sikhs, Jains, etc. as from 1st January 1927.
- (b) Act XL of 1926 which amended sec. 33 and added sec. 33 A.
- (c) Act X of 1927 which amended sec. 2 and sch. I.
- (d) Act XVIII of 1927 which amended sections 223, 236 of this Act and Sec. 9 of the Married Women's Property Act.
- (e) Act XIV of 1928 which amended sec. 372.
- (f) Act XXI of 1928 which amended sec. 213.
- (g) Act XVIII of 1929 which amended secs. 2, 57 and 213.
- (h) Act XXI of 1929 which amended secs. 115 and 116.
- (i) Act XVII of 1939, (Parsi Intestate Succession Act) which repealed sections 50 to 56 and substituted new sections. This Act is repealed by Act XXV of 1942.

Commencement of the Act:—There is no section in this Act as regards its commencement. Therefore under the General Clauses Act X of 1897, sec. 5, it comes into operation on the day on which it received the assent of the Governor-General. This assent was given on the 30th September 1925. As this is a consolidating and repealing Act, the Provincial Government has been empowered under sec. 3 either retrospectively from the 16th day of March 1865 (on which date assent was given by the Governor-General to the Indian Succession Act of 1865) or prospectively to exempt from the operation of certain sections any race or tribe to whom it would be impossible or inexpedient to apply the same. It was held in *Bhimrao v. Punjab Rao*(b), that the Act had no retrospective effect and did not apply to a will executed in 1890, and the bequest to unborn persons not in existence at the time of the death of the testator was void. In *Richard Ross v. Durga Prasad*(c), it was held that the Act of 1865 was not retrospective and did not apply to wills executed before it came into operation.

History:—The Indian Succession Act of 1865 was based on English law and was declared to constitute, subject to certain exceptions, the law of British India applicable to all classes of intestate and testamentary succession. But the exceptions were so wide as to exclude all natives of India, (*See Ilbert's Government of India*, 3rd Edn., p. 362). A very important change was made by the Hindu Wills Act 1870 (Act XXI of 1870) which *inter alia* enacted that certain portions of the Indian Succession Act should apply to all wills and codicils made by any Hindu on or after the 1st day of September 1870. The Probate and Administration Act V of 1881 was applied to Hindus and Mahomedans.

This Act reproduces in a consolidated form the Act of 1865, the Hindu Wills Act, the Probate and Administration Act and the Parsi Intestate Succession Act and embodies to a large extent the rules of English law. The Indian legislature has gradually evolved an independent system of its own purporting to be a self-contained system.

Construction of the Act.—As the Act is a consolidating Act, it is an exhaustive enactment of the Indian legislature and therefore in interpreting the various sections of the Act, the Courts should proceed to examine the language of the section uninfluenced by any consideration derived from English law. In the case of *Administrator General of Bengal v. Premlal*(d), their Lordships of

(b) 158, I. C. 1042.
(c) 31 All. 239.

(d) 22 Cal. 788.

the Privy Council observed that in a consolidating statute each enactment, when traced to its source, should be construed according to the state of things which existed at a prior time when it first became law, the object being that the statutory law, bearing on the subject should be collected and made applicable to the existing circumstances; nor can a positive enactment be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject. In *Abdur Rahim v. Mahomed(e)*, their Lordships of the Privy Council have laid down that "It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or to the English law upon which it may be founded; but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended." It is laid down in Maxwell on the Interpretation of Statutes that in a Consolidation Act if it re-enacts a previous Act, if a word or phrase in one of the Acts consolidated has received a judicial interpretation, that interpretation will generally be applicable to the same word or phrase in the Consolidation Act. If a certain construction has been placed by the Courts upon words in an Act and that Act is subsequently re-enacted in a later Act which uses the same words, the Legislature must be taken to have intended to adopt that construction unless there is something in the rest of the Act which negatives such a conclusion(f).

Scope and Operation of the Act.—Sec. 2 of the Succession Act of 1865 is not reproduced. That section operated as a repeal of the previous existing law(g). Sec. 392 was the repealing section under this Act; but it has been repealed by Act XII of 1927. Sec. 3 empowers the Provincial Government to exempt from the operation of secs. 5 to 49 (domicile, marriage and intestate succession), 58 to 191 (testamentary succession, execution of wills, and rules of construction), 212, 213, 215 to 369 (grants) the members of any race, sect or tribe. In its general scope, therefore, this Act applies to all persons wherever this Act would be declared to be in force, except as provided by the Act.

Extent of the Act:—Sec. 2 of the Act of 1865 is omitted and is split up and reproduced partly in secs. 29 (2), 58 (2) and 217. By sec. 2 of the Act of 1865 it was provided that the rules laid down by that Act constituted the law of British India applicable to all cases of Intestate or Testamentary Succession. By the present Act sec. 29 (2) it is enacted that Part V comprising sections 29 to 56 shall constitute the law of British India in all cases of intestacy applicable to all the persons in British India except Hindus, Mahomadians, Buddhists, Sikhs or Jains. By sec. 58 (2) it is further enacted that the provisions of Part VI comprising secs. 57 to 191 shall constitute the law of British India applicable to all cases of testamentary succession except as to Mahomadians and except as provided in sec. 57 to testamentary succession to the property of any Hindus, Sikhs and Jains and except as to any will made before 1st January 1866.

By the Western India States Administered Order, 1942, in the territories included in Thana Circles, Civil Stations and Sadra Bazar in the Western India States Agency the Indian Succession Act is made applicable subject to the following modifications and restrictions.

- (1) References to a Court of Ward shall be read as referring to a Political Agent.

(e) 55 I. A. 96.

(f) *Gangadhar v. Sripad*, (1938) Bom. 675 F. B.

(g) *De Souza v. Secretary of State*, 12 B. L. R. 427.

- (2) Omit sections 11, 57, in section 58 the words "save as provided by Sec. 57", sub-sec. (2) of sec. 264 and Schedule III.
- (3) For sec. 382 substitute :—

382. Where a certificate in the form of the Eighth Schedule to this Act has been granted by a Court having jurisdiction under the Act in British India or under the Act as applied in any area outside British India which is under the administration of the Crown Representative ; or where a certificate has been granted to a subject of or resident within a state in the Western India States Agency by the Political Agent, having jurisdiction, on the production by such subject or resident of a certificate granted to him by a State Court; or where a certificate so granted has been extended; the certificate shall, if it has been stamped in accordance with the law in force in the Administrated Area, have the same effect as certificates granted or extended under this Act.

(See Gazette of India Part I A. 31-10-1942 p. 221 and p. 224).

By another Order called the Western India States Full Jurisdiction Railway Lands (Application of Laws) Order 1942 the Indian Succession Act is made applicable to Railway Lands subject to the same modifications and restrictions, except that the certificate has been stamped in accordance with the provisions of the Court Fees Act, 1870, (see Gazette of India Part I. A. 31-10-1942 p. 230).

By the Order called the Hyderabad Administered Areas (Application of Laws) Order 1942 the Indian Succession Act is made applicable to cantonments of Secunderabad and Aurangabad and Railway Lands subject to the following modifications and restrictions :—

(1) Sec. 11 is omitted.

(2) In Sec. 382—

- (i) after the words "to that State" insert "or by a Court having jurisdiction under the Act in British India or under the Act as applied in any area outside British India which is under the administration of the Crown Representative"
- (ii) after the words "such representative" insert "or by such Court" and
- (iii) omit the words "when stamped in accordance with the provisions of Court Fees Act, 1870" and the words "in British India"

(See Gazette of India Part I-A. 30-10-1942 p. 235 and p. 243).

By the Punjab States Railway Lands (Application of Laws) Order 1942, the Indian Succession Act with the modification therein mentioned is made applicable to the Punjab States Railway Lands. The modifications are

- (1) Omit sections 11 and 57, the words and figures "save as provided by sec. 57" in sec. 58, sub-section 2 of sec. 264 and Schedule III.
- (2) For Section 382 substitute :—

"382. Where a certificate in the form of the Eighth Schedule to this Act has been granted by a Court having jurisdiction under the Act in British India, or under the Act as applied in any area outside British India which is under the Crown Representative, or where a certificate has been granted to a subject of, or resident within, a foreign state in the Agency by a Political Agent on the production by such subject or resident of a certificate granted to him by a State Court, or where certificate so granted has been extended, the certificate shall, if it has been stamped in accordance with the provisions of the Court Fees Act, 1870, have the same effect as certificates granted or extended under this Act.

(See Gazette of India Part I-A, d. 14-11-42 pp. 251 and 254.)

By the Baroda Cantonment (Application of Laws) Order 1943 (published in the Gazette of India Part I-A on 14th August 1943 p. 107) the Indian Succession Act, 1925, is made applicable to the Baroda Cantonment subject to the modifications and restrictions contained in the said order.

- (1) Omit sec. 57, in section 58, the words "save as provided by sec. 57," sub-sec. (2) of sec. 264 and Schedule III.
- (2) In the proviso to sec. 273 after the words "granted" insert "under the Act as in force in British India or under the Act as applied to any area under the administration of the Crown Representative"; for the words "beyond the limits of the Province" substitute "in the Baroda Cantonment" and for the words "have like effect throughout the whole of British India" substitute "have the same effect as grants under this Act".
- (3) For Sec. 382 substitute—
 "382. Where a certificate in the form of Schedule VIII has been granted under the provisions of this Act by a Court having jurisdiction under the Act in British India or under the Act as applied in any area outside British India which is under the administration of the Crown Representative, or where a certificate in the form, as nearly as circumstances admit, of the said Schedule has been granted to a resident within a foreign State by the British representative accredited to that State or where a certificate so granted has been extended in such form by such Court or by such representative, the certificate shall, if it has been stamped in accordance with the law in force in the Baroda Cantonment, have the same effect as a certificate granted or extended under this Act."

To whom the Act does not apply:—

- (1) **Crown:—**This act does not apply to the Crown when it takes the property upon escheat(*h*).
- (2) **Armenians:—**Armenians were held to be governed by English law(*i*).

To whom the Act applies:—It applies to

- (1) Europeans by birth or descent domiciled in British India. As regards other European and English subjects if they die possessed of immoveable properties in British India, then under sec. 5 succession to such properties shall be regulated by the law of British India, i.e. if such person died intestate, his heirs will be according to the rules of intestate succession in Part V of this act, and letters of administration will be necessary and if he left a will, the will must be executed according to rules laid down in Chapter III secs. 63-64, and probate of such wills will be necessary. As regards the Portuguese it was held in *Lopez v. Lopez*(*j*) and *Antao v. Ardesir*(*k*), that they were governed by the English law.
- (2) Persons of mixed European and Native blood and East Indians,
- (3) Indian Christians. For the purposes of the Indian Succession Act, a Christian is a person who professes any form of the Christian religion(*l*). Section 33 A of the Act is not made applicable to them.

(*h*) *Secretary of State v. Girdharilal*, 54 All. 226.

(*i*) *Nicholas v. Aspar*, 24 Cal. 216.

(*j*) 12 Cal. 706.

(*k*) 1 Bom. L. R. 303, in appeal 2 Bom. L. R. 431.

(*l*) *Ma Khun v. Ma Ahma*, 12 Rang. 184.

- (4) Jews : After the Indian Succession Act, 1865, was passed in *Gabriel v. Mordakai(m)*, it was held that the Jews were governed by that Act and the personal laws of the Jews were not recognised as regards testamentary and intestate jurisdiction. Prior to this decision in *Musleah v. Musleah(n)*, it was held that succession to the land situate in the Mofussil and belonging to a Jew who was an inhabitant of Calcutta at the time of his death would be regulated by English law. This decision was considered in *Mozelle Joshua v. Sophie Arakie(o)*, That was a suit by a Jewish widow to enforce her claim to a sum of money settled by way of dower under the Jewish law in terms of her marriage contract.

The Bombay High Court considered the application of Jewish law in the following cases : *Benjamin v. Benjamin(p)* That was a suit for dissolution of marriage by the wife against her husband on the grounds of adultery and cruelty. Crump, J., held that Jewish law was applicable and gave relief. This decision, however, has not been approved by Das, J., in *Jacob v. Jacob(q)*. In *Ezekiel v. Reuben(r)*, following *Benjamin v. Benjamin* Wadia, J., applied Jewish law and a similar decision was given by Blagden, J., in *Paul Engel v. Edith Engel(s)*.

- (5) Foreigners(t).

- (6) Parsis. The word "Parsi" has now been defined by the Parsi Marriage and Divorce Act III of 1936. Chapter III of this Act reproduced the Parsi Intestate Succession Act XXI of 1865 which was repealed by this Act. Sections 50 to 56 lay down special rules of succession in case of intestacy of a Parsi. They have been enacted by Act XVII of 1939. As regards testamentary law all the sections of this Act apply to Parsis. Only Part V, Chapter II does not apply to Parsis.

- (7) Muhammadans. The following sections of the Act are made applicable to them. viz., Part II, secs. 4 to 19, 20, 21, 22, 23 to 28, 29 to 56, 57, 58, 59 to 191.

- (8) Hindus. The word "Hindu" is used in this Act in a theological sense as distinguished from a national or racial sense. A person of non-Hindu origin can become a Hindu by conversion and the provisions of this Act applicable to Hindu wills apply to such a person(u). The following sections do not apply to Hindus, Jains, etc., viz., Part II, Secs. 4 to 19, 20, 21, 22, 23 to 28, 29 to 56, 60, 65, 66, 67, 69, 72. Sec. 57 of the Act makes the provisions of Part VI applicable subject to the restrictions and modifications specified therein to all the wills and codicils made by a Hindu. This section was amended by Act XVIII of 1929. Sec. 3 of that Act added clause (c) to sec. 57 and the Part VI is now made applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain on or after 1st January 1927. (See commentary to sec. 57.)

By sec. 24 of Act III of 1872 (Special Marriage Act) as amended by Act XXX of 1923 succession to the property of a person professing the Hindu, Buddhist, Sikh or Jain religion who marries under that Act and to the property

(m) 1 Cal. 148.
 (n) (1844) 1 Ful Rep. 420.
 (o) 38 Cal. 708.
 (p) 50 Bom. 369.
 (q) (1944) 2 Cal. 201 at p. 281.
 (r) 55 Bom. 803.

(s) A. I. R. (1944) B. 15.
 (t) *Amar Singh v. Sham Singh*, A. I. R. (1935) L. 646.
 (u) *Ratansi Morarji v. The Administrator General of Madras*, 52 Mad. 160.

of the issue of such marriage is regulated by the provisions of the Indian Succession Act 1865 (now the present Act). Before the passing of Act XXX of 1928, succession to the property of such parties was governed by their personal law. In *Thukru v. Attavar(v)* and *Vidyagouri v. Naraindas(w)*, it was held that Act XXX of 1928 was not retrospective.

- (9) Jains. Although Jains are governed by Hindu law ordinarily(x), yet they possess the privilege of being governed by their own peculiarities and customs(y). It was held in *Bachebi v. Mukhanlal(z)* and *Chotay Lall v. Chunnoo Lall(a)*, that the term "Hindu" included Jains.
- (10) Sikhs. In *Bhagwan Kuar v. Jogendra Chandra Bose(b)*, it was held that the term "Hindu" included the Sikhs. But Sikh converts to Christianity are governed by this Act and not by laws and customs of community to which they belong(c).
- (11) Brahmos. In *In the Goods of Jnanendra Nath(d)*, it was held that the Brahmos were not governed by this Act. A Hindu does not cease to be a Hindu by becoming a member of the Brahmo Samaj(e).
- (12) Buddhists. In *Ma Yait v. Maung Chit(f)*, it was held that the Burmese known as Kalias who married Burmese women were governed by this Act. But a Chinaman who is a Buddhist comes within the term Buddhist and the succession and inheritance to his property is governed by the Buddhist law of Burma(g). But Chinese Buddhists (domiciled in Burma) are governed by this Act(h).

Hindu Converts to Christianity.—The law applicable to converts before the passing of the Succession Act X of 1865 was not in a settled condition. The question came before the Privy Council in the case of *Abraham v. Abraham(i)*, and their Lordships expressed the following opinion:—"That upon the conversion of a Hindoo to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.....The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his power over property. The convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters.....that the rights and interests in his property and his powers over it, should be governed by the law which he has adopted or the rules which he has observed." Macnaughten in his "Hindu Law," Vol. II., pp. 131, 132 states that, "On the death of an apostate from the Hindu faith, his heirs according to Hindu law will take all the property which he had at the time of his conversion, that his subsequent acquired property would be governed as to its devolution by the law of his new religion". According to the above Privy

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| (v) 58 Mad. 1004. | (d) 26 C. W. N. 799. |
| (w) 30 Bom. L. R. 139; A. I. R. (1928) B. 74. | (e) <i>Bhagwan Kuar v. Jogendra Chandra Bose</i> , 30 I. A. 249. |
| (x) <i>Getappa v. Eramma</i> , 50 Mad. 228. | (f) 48 I. A. 553; 49 Cal 310. |
| (y) <i>Sheo Singh v. Mussumat Dakho</i> , 5 I. A. 87; <i>Kalgavda v. Sanappa</i> , 33 Bom. 669. | (g) <i>Tan Ma Shwe v. Koo Soo Chong</i> , (1939) Rang. 548. |
| (z) 3 All. 55. | (h) <i>Ma San v. Ma Chit</i> , A. I. R. (1930) R. 219; <i>Phan Tiyoek v. Lin Kym</i> , 8 Rang. 57 (F. B.). |
| (a) 4 Cal. 744. | (i) 9 M. I. A. 194. |
| (b) 30 I. A. 249; 31 Cal. 11 (P. C.). | |
| (c) <i>Ranber Karam v. J. C. Bhattacharji</i> , (1940) All. 100. | |

Council decision, therefore, Native Christians and such other native tribes, as are not governed either by the Hindu or by the Mahomedan law, would be governed by the law which they have adopted by the course of their conduct or by the customary law which they had observed from times immemorial(*j*).

After the passing of the Succession Act X of 1865 the earlier cases are *Re Joseph Vathiar*(*k*) and *Ponnusami v. Dorasami*(*l*). In *Dagree v. Pacotti*(*m*) it was held that they were governed by the Succession Act and that case was followed in *Napen Bala v. Sita Kanta*(*n*) and *Adm. Gen. v. Ananda Chari*(*o*). In the Privy Council case of *Kamarwati v. Digbijai*(*p*), their Lordship distinguished the case of *Abraham v. Abraham* and *Sri Gajapathi v. Sri Gajpathi*(*q*) as being the decisions before the passing of Succession Act of 1865 and held that if a Hindu convert to Christianity died a Christian he was governed by that Act. He has no right to elect that he is governed by Hindu law of inheritance(*r*), (See Mulla's Hindu Law, 9th Edn. p. 7).

Rights of Converts in the Joint Family Property.—According to Hindu law every coparcener takes by birth a vested interest in the joint family property. The Act does not affect the right of coparcenership as between those to whom it applies. The Act does not take away any vested right of a coparcener(*s*). In *Tellis v. Saldanha*(*t*), however, it was held that the right of survivorship of a coparcener was a contingent right. Therefore if *A* and *B* being brothers in a coparcenery own property jointly and if *A* becomes a Christian and if *B* dies after the passing of the Succession Act the right of *A* to succeed to the whole property by survivorship is gone. This decision, however, has been disapproved in *Francis Ghosal v. Gabri Ghosal*(*u*) where it was held that the Succession Act did not affect the rights of coparcenership. In *Kulada Prasad v. Haripada Chatterjee*(*v*) it was held that upon the conversion of a member of a joint Hindu family to Christianity the member continued to hold the ancestral property as joint owner and he was entitled to recover possession of his share on the basis that there was a dissolution of the family at the date of his conversion, that he was not liable to satisfy the debts of his father incurred and charged upon ancestral property subsequent to the date of his conversion but was liable for debts incurred prior to conversion.

Rights of the Hindu Relations of a Convert to the Convert's Property.—The question of the right of the parents of the convert to the convert's property was considered in the following two cases, *Sinammal v. The Adm.-General*(*w*) and *Adm.-General v. Anandachari*(*x*), both of which suits related to the same estate of a Hindu convert. The facts are —*A* became a Christian, his wife *S* refused to live with him and renounced all claim to his estate. *A* married *M* a Christian and died intestate leaving property. *S* filed a suit claiming the estate but she died and her suit abated. Administrator-General took possession of the property and filed a suit for administration of the estate which was claimed by (*a*) father of *A*, (*b*) undivided brother of *A* and (*c*) executors of *M*. Held that *S* was the wife of *A* and that the marriage of *A* with *M* was not legal, that if *S* had not released her claim, she would be entitled to half of the estate. Held, accordingly that under sec. 35 of the succession Act X of 1865 the father was entitled to the whole of the estate.

(*j*) *Richard Skinner v. Durga Prasad*, 31 All. 239; *Lastings v. Gonsalves*, 23 Bom. 539.
(*k*) 7 M. H. C. 121.
(*l*) 2 Mad. 209.
(*m*) 19 Bom. 783.
(*n*) 15 C. W. N. 158.
(*o*) 9 Mad. 466.
(*p*) 43 All. 525, 48 I. A. 381.

(*q*) 14 W. R. (P. C.).
(*r*) *Dwarkanath v. Rajaram*, 134 I. C. 872.
(*s*) *Ponnusami v. Dorasami*, 2 Mad. 209.
(*t*) 10 Mad. 69.
(*u*) 31 Bom. 25.
(*v*) 40 Cal. 407.
(*w*) 8 Mad. 169.
(*x*) 9 Mad. 467.

Rights of Convert's Relations to the Property of his Hindu Relations.—

In *Bhagwansingh v. Kalu*(y), a Hindu became a Mahomedan and married a Mahomedan wife and a son was born to the Mahomedan wife. The son's Hindu uncle died leaving property. The son filed the suit claiming the property as the heir of his uncle and his claim was allowed. This decision is followed in *Rupa v. Sardar Mirza*(z) but is disapproved by the Privy Council in *Mitar Sen v. Magbul*(a). In *John Jiban v. Abinash*(b), a Christian became a Mahomedan and it was held that the succession to his property was governed by Mahomedan law and not by this Act.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) “administrator” means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;
- (b) “codicil” means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will;
- (bb) “District Judge” means the Judge of a principal Civil Court of original jurisdiction (see Act XVIII 1929);
- (c) “executor” means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;
- (d) “Indian Christian” means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion;
- (e) “minor” means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years; and “minority” means the status of any such person;
- (f) “probate” means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator;
- (g) “province” includes any division of British India having a Court of the last resort; and
- (h) “will” means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

Amendment :—*This is Sec. 3 of the Succession Act X of 1865 with the following changes :—The definitions of “person” “year,” “month,” “immoveable property,” “moveable property,” “Local government,” “High Court,” “British India,” are dropped. For the definition of these words see the General Clauses Act X of 1897. The definition of “minor” and “minority” is adopted from the Probate and Administration Act. No change has been made in the other definitions. The definition*

(y) 1 All. 100.
(z) 1 Lah. 376.

(a) 57 I. A. 313.
(b) (1939) 2 Cal. 12.

of "Indian Christian" is taken from the *Native Christian Administration of Estates Act VII of 1901* except that the phrase "Indian Christian" has been used instead of "Native Christian" See *Notes on Clauses*.

(a) "**Administrator.**"—The definition of this word is the same as in the Act of 1865. Under secs. 218 and 219 if a person dies *intestate* letters of administration of his estate are granted to the person or persons as provided in those sections and such person is called an administrator. Letters of administration are also granted under sec. 232 when a person dies *leaving a will* but has not appointed an executor or if the executor appointed by the will is legally incapable or refuses to act or who has died before the testator or before he has proved the will. In these cases letters of administration with the will annexed are granted to the person mentioned in that section. Under the same section if a proving executor dies without fully administering the estate letters of administration with the will annexed are also granted. There are also other cases when letters of administration are granted. (See sections 240, 241, 242, 243, 244, 245, 246, 247, 249, 250, 251, 252, 253, 254, 256, 258 and 260). A person to whom grant of letters of administration is made under these sections is also called an administrator. An administrator can only be appointed by a competent Court as distinguished from an executor who can only be appointed by a person by his will or codicil.

Under the English Statute "Administration of Estates Act", 1925 (15-Geo. V ch. 23 s. 54) an administrator means a person to whom administration is granted.

(b) "**Codicil.**"—The definition is practically the same as in the Act of 1865, except that the words "and shall be deemed to form a part of the will" are substituted for the words "it is considered as forming an additional part of the will." Under the General Clauses Act a will includes a codicil. Before the English Wills Act (1 Vic. c. 26) it was held that a codicil depended on the will and a revocation of the will was an implied revocation of the codicil. By sec. 20 of Statute 1 Vic. c. 26 the law was altered. The corresponding section of this Act is sec. 70 and a codicil is not revoked by revocation of the will(c). A codicil is ordinarily an instrument made in relation to a will, but it may operate by itself as a will and probate can be granted of the codicil alone(d). The definition of "codicil" as given in Halsbury, Vol. 34 p. 7 is as under: "A codicil is of similar nature to a will, and in general is supplemental to and considered as annexed to a will previously made, and executed for the purpose of adding to, varying, or revoking the provisions of that will, though it is capable of independent existence."

The effect of confirming a will by a codicil is to bring the will down to the date of codicil and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same disposition as the original will had with the alterations introduced by the codicil. Its effect is republication of the will and to make a devise in the will operative in the same way in which it would have been operated if the words were contained in the codicil(e). A codicil duly executed will give effect and operation to unattested alterations in a will(f). A defective bequest in a will may stand cured by a codicil(g).

(bb) "**District Judge.**"—The definition is added by the amending Act XVIII of 1929. It includes the Judge of a High Court on its original civil jurisdiction side(h). The definition was in the Act of 1865 but was omitted when this Act was passed as the General Clauses Act contained the definition of the words "District

(c) *In the goods of Turner*, L. R. 2 P. & D. 408. (f) *Skinner v. Ogle*, (1845) 4 N. C. 74; (1845) Rob. Eccl. 363.

(d) *Black v. Jobling*, 1 P. & D. 685; *In the goods of Savage*, 2 P. & D. 78.

(g) *Anderson v. Anderson*, 18 Eq. 381.

(e) *Goonewardene v. Goonewardene*, A. I. R. (1931) P. C. 309.

(h) *Manubhai v. General Accident Fire & Life Assurance Corporation*, 38 Bom. L. R. 632 at 655.

Judge." That definition, however, did not include the Judge of a High Court on the ordinary and extraordinary original civil jurisdiction side and it was held that a High Court Judge on its original side was not competent to grant a "Succession Certificate" under section 371; but since the amending Act it has power to do so⁽ⁱ⁾. (See Statement of Objects and Reasons, Gazette of India, 1929 Part V p. 209).

The definition of the words "High Court" given in the Act of 1865 is omitted from this Act.

(c) "Executor."—The definition of this word is the same as that given in the Act of 1865.

(cc) **Executor and Administrator.**—The distinction between an executor and an administrator is well pointed out in the section. An executor is always appointed by will and derives his authority therefrom. His appointment may be either express or implied, and in the latter case he is called executor according to the tenor. An administrator is always appointed by Court where there is no executor and he derives his title from the grant.

The person making the will or codicil is called the "testator".

Executor and Trustee.—Under Section 3 of the Indian Trusts Act II of 1882 a trustee is a person who accepts the confidence declared by the "author of the trust" and under Section 5 of the same Act a trust of property moveable and immoveable can be made by the will of the author of the trust. When a trust is proposed to be created by will, the testator usually appoints his executors also the trustees of the trust or he appoints executors to administer his general estate and trustees to administer the trust estate. If the residue of the estate is bequeathed on trust the executors after administering the general estate either hand over the residue to the trustees of the trust of the residue if separate trustees are appointed by the will, but if the executors are themselves appointed trustees, then the executors can convert themselves into trustees when the estate is cleared from the payment of debts and legacies^(j). Where a fund is bequeathed on trust and the executor is also appointed trustee of that fund as soon as he has severed the fund from the general estate and appropriated it to the specific purpose of the trust the executor dismisses his character of executor and assumes that of a trustee^(k). The distinction between an executor and a trustee is this that an executor after once accepting the office of an executor cannot retire by appointing some one in his place without fully administering the estate, but a trustee can retire by appointing a new trustee under sec. 71 of the Indian Trusts Act.

Another distinction between an executor and a trustee is that if an executor or an administrator buys the property of the deceased it is not a breach of trust and, if a fair price is paid, the sale is not void but it may be the subject to inquiry by a Court of Equity. Under section 310 the sale is voidable at the instance of a person interested in the property. But a trustee for sale cannot buy the property at all. It is a breach of trust without inquiry whether a fair price is paid or not. Section 52 of the Indian Trusts Act is explicit.

A further distinction is as regards accounts to be rendered by executors and trustees. In the case of an executor a suit for account of the estate is barred after six years under Art. 120 of the Limitation Act^(l). But there is no limitation against a trustee for the account of the trust property. Under section 10 of the

(i) *In Re Kuppuswami Nayagar*, 53 Mad. 237; *In re Lakshmidas Bhargji*, Bombay Law Journal 1930, p. 192; *In re Bholanath Pal*, 58 Cal. 801; *In re Aroonachalam*, 9 Rang. 205.

(j) *Re Smith*, 42 Ch. D. 302.

(k) *Phillips v. Munnings*, 2 M. & C. 309.

(l) *Barada Prasad v. Gajendra Nath*, 13 C. W. N. 557, 9 C. L. J. 383.

Limitation Act there is no bar of limitation against an executor if he is a trustee for a specific purpose(m).

Further an executor who has not become a trustee by assenting to the legacies cannot claim the advantage given to the trustees under sec. 34 of the Indian Trusts Act. If he feels doubt as to the manner in which he should administer the estate, his remedy is to file an administration suit(n).

(d) “**Indian Christian.**”—The definition is taken from the Native Christians Act (Act VII of 1901) except that instead of the words “Native Christian,” the words “Indian Christian” are used.

(e) “**Minor.**”—The definition is adopted from the Probate and Administration Act (Act VI of 1881). Under the Indian Majority Act, sec. 3 it is enacted that every minor of whose person or property a guardian other than a guardian *ad litem* is appointed or declared “by any Court of Justice before the minor has attained the age of eighteen years and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall *notwithstanding anything contained in the Indian Succession Act* (X of 1865) or in any other enactment be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before; subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before”(o). The appointment must be made under the Guardian & Wards Act to extend the minority. Testamentary Guardian is not a person to be deemed a guardian. In accordance with the above definition of ‘minor,’ a person residing in a Native State though he may be a major according to the law of that State will be a minor if he has not completed the age of 18 years(p). As to how the age is to be computed see sec. 4 of the Indian Majority Act.

The questions of minority under this Act arises : (a) with regard to domicile under section 14 ; (b) with regard to the making of will—a minor cannot make a will under section 59 ; and (c) with regard to the appointment of executor. A minor may be appointed executor but under section 223 probate cannot be granted to a minor.

(f) “**Probate.**”—The definition of this word is the same as in the Act of 1865 and in the Probate and Administration Act (Act VI of 1881). The grant of letters of administration with the will annexed under section 232 is held to be the grant of probate within the meaning of this definition(q). For form of probate see Schedule VI. It was held by Markby, J., that the grant of probate is a decree of the Court(r) but Banerji, J., has held that probate is not a judgment order or decree(s). Chatterji, J., has also held that probate is not a decree(t).

(g) “**Province.**”—The definition is the same as in the Act of 1865. Under the General Clauses Act (Act X of 1897) “Province” means the territories for the time being administered by any Local Government. (See Notes on Clauses).

(h) “**Will.**”—The definition is word for word the same as in the Act of 1865. Under the General Clauses Act will includes a codicil and every writing making a voluntary posthumous disposition of property. In Halsbury, Vol. 34 p. 6 a will or testament is the declaration in a prescribed manner of the intention of the

(m) *Damodar v. Dayal*, 11 Bom. L. R. 1187; (q) *Chandra Kishore v. Prasanna*, 38 Cal 327.
Soonderdas v. Laxmibai, 47 Bom. L. R. 934. (r) *Komolochun v. Nilruttan*, 4 Cal. 360 (see also *Bhagwandas v. D. D. Patel & Co.*, A. I. R. (1940) B. 131.)
(n) *Trimbal v. Narayan*, 11 Bom. L. R. 495. (s) *Rajib Panda v. Lakhan Sendh*, 27 Cal 11.
(o) *In the Goods of Effie Jessie Caroline*, 23 C. W. N. 527. (t) *Raj Kishore v. Promoda Behari*, 2 Pat. 756.
(p) *In the goods of Sewnarain Mohata*, 21 Cal. 911.

person making it, with regard to the matters which he wishes to take effect upon or after his death. A will differs from a deed in the following respects: (a) A deed operates *eo instanti*, i.e., from the date of its execution; a will comes into operation on the death of the testator; (b) a deed is ordinarily irrevocable, unless there is an express power of revocation; a will can be revoked at any time by the testator during his lifetime; it becomes irrevocable on the death of the testator; (c) in case of mistake in a deed, the Court has power to rectify it; a will cannot be rectified by any Court of law.

Purpose of the will :—A will may be made for the purpose (a) of appointing an executor, (b) for appointing a testamentary guardian, (c) for exercising a power of appointment, and (d) for revoking or altering a previous will.

The Essential characteristics of a Will are :—

- (a) There must be a legal declaration.
- (b) The declaration must be with respect to the property of the testator.
- (c) The declaration must be to the effect that it is to operate after the death of the testator, i.e., it is revocable during the life of the testator.

If any of the three essentials is lacking the document is not a will.

(a) **Legal Declaration.**—The document purporting to be a will or testament must be legal, i.e., in conformity with the provisions as regards the execution and attestation as provided by section 63 of the Act, and must be by a person competent to make it. A minor is legally incompetent to make a will and a will by a minor is not a legal declaration(u). The mere use of the word “will” cannot make it a will if it does not amount to a testamentary declaration disposing of the property(v).

(b) The declaration should relate to the property of the testator which he wants to dispose of. If the declaration contains no reference to the disposal of the property but merely appoints a manager to manage the property or gives merely an authority to his widow to adopt it is not a will.

Examples.

- (i) A document executed by an old Hindu whereby he partitioned his property amongst his sons was styled “Will”. It contained the following clause, “If I at any time come back from pilgrimage and find mismanagement or the character of any one bad, then I shall have the power to cancel this will.” *Held*, it was not a will but a family agreement(w).
- (ii) A Hindu executed the following document :—“I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent.” *Held*, that the document was not a will(x).
- (iii) A Hindu member of a joint family consisting of himself and his nephew executed a deed called Vyavasthapatra. He made a declaration that he had separated from the nephew from that date but it was not possible to effect by metes and bounds but he had made a symbolical partition of the property. He then made a disposition of his property giving a half share of the income of his property to his widow, etc. The document was also signed by the nephew. *Held*, that the deed effected immediate separation of the joint status and was a will and entitled to probate(y).

(c) The declaration as regards the disposal of the property of the testator must be intended to take effect after his death. Some disposition of property by will is necessary(z). If the declaration is not to that effect or if the declaration is to carry into effect the intention of the writer immediately, i.e., *inter vivos* then

(u) *Vijayaratnam v. Sudasana Rao*, 48 Mad. 614 P. C.

(v) *Venkatarama v. Sundarambal*, 42 Bom. L. R. 912 at p. 914.

(w) *Brijraj v. Sheodan*, 40 I. A. 161.

(x) *Bheema Deo v. Behari Das*, 44 Mad. 733

(P. C.).

(y) *Ramchandra v. Ramabai*, 39 Bom. L. R. 165.

(z) *Uma Charan v. Rakhal Das*, A. I. R. (1927) C. 756.

it is not a will. The essence of every testamentary instrument is that it is revocable during the life of the testator(a). In this respect a will differs from a deed which takes effect during life and is irrevocable. Hence a will is said to be ambulatory until the death of the testator. One of the tests to ascertain whether an instrument is a will or a deed is to see if it is revocable(b). A document which is plainly intended to be operative immediately and to be final and irrevocable is a non-testamentary instrument(c). But a deed not intended to have any effect till the settlor's death is testamentary(d).

The mere fact that the testator calls it irrevocable or covenants not to revoke it does not alter its quality and it is nevertheless revocable except only in case of a joint will(e). Nor does the fact that the writer of the instrument calls it a "will" make it a testamentary document if it does not amount to testamentary disposition. What is necessary is that the will must make a disposition of the testator's property and the declaration regarding the disposition must be in accordance with the provisions of the law(f). Another test is to ascertain whether the dispositions made by the instrument are intended to take effect immediately on execution or during any period in the life of the executant or whether the dispositions are to take effect after his death. An instrument which reserves a life interest to the maker is not a will(g). An instrument may be partly of a testamentary character and partly a deed(h) and probate may be granted of a part of the will(i). In the case, however, of an instrument of which one part is proved to be of a testamentary character, the Court may presume that the remainder is also intended to be testamentary(j).

Examples.

(a) A Hindu by an instrument provided as follows :—"As long as I live I take the profits and you should maintain me as if I were one of the members of your family. I have no ownership therein, the ownership belongs to you from this day . . . whatever property there may be after my death other than that described above is all given to you." *Held*, that the instrument was not a will but a conveyance(k).

(b) A tamluknama (assignment) on a stamp paper whereby the writer stated that during his lifetime he would hold and enjoy the property and that after his death his brother B should hold and enjoy the same like himself and maintain his wife was held to be a will(l).

(c) A Vyavasta Patra (deed of settlement) executed by a Hindu on taking a son in adoption containing the words "as to what should be done by my adopted son and my wife after my lifetime" was held to be a will(m).

(d) A Hindu three weeks before his death executed a document headed "will" in favour of his wife and contained the following : "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter". *Held*, it was not a will. It was merely an authority to adopt and as it was not registered it was void(n).

(e) Sambandha Nirnaya Patra (a matrimonial arrangement deed) in the form of a letter whereby the writer informed the addressee that the writer settled the marriage of his daughter with Krishna Gopal on condition that Krishna Gopal shall after the marriage live in the writer's family house and on the demise of the writer and his wife Krishna Gopal shall be entitled to all the properties of the writer. The document was attested by three witnesses. *Held*, the writing was a will and was admitted to probate(o).

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| (a) <i>Rajammal v. Authammal</i> , 20 M. L. J. 320. | (g) <i>Sundarambal</i> , 42 Bom. L. R. 912 at 914. |
| (b) <i>Musst. Sita Koer v. Munshi Deo Nath</i> , 8 C. W. N. 614; <i>Dintarini v. Krishna</i> , 13 C. W. N. 292. | (h) <i>Pirsab v. Gurappa</i> , 38 Bom. 227. |
| (c) <i>Umrao Singh v. Lachman Singh</i> , 33 All. 344; <i>In Re Reference by Collector</i> , 20 Bom. 210 F.B.; <i>Pirsab v. Gurappa</i> , 38 Bom. 227; <i>Uma Charan v. Rakhal Das</i> , 46 C. L. J. 145. | (i) <i>Chandmal v. Lakhmi</i> , 22 All. 162. |
| (d) <i>In the goods of Robinson</i> , 1 P. & D. 384. | (j) <i>Kedar Nath v. Sarojini Dasi</i> , 26 Cal. 634. |
| (e) <i>Sagore Chandra v. Digambar</i> , 14 C. W. N. 174. | (k) <i>In Re Komola Kant Biswas</i> , 4 C. H. C. R. 401. |
| (f) <i>Tirugnanapal v. Ponnammal</i> , 25 C. W. N. 511 (P. C.); <i>Bhima v. Behari Das</i> , 44 Mad. 733 (P. C.); <i>Venkaturama v.</i> | (l) <i>Rambhat v. Lakshman</i> , 5 Bom. 630. |
| | (m) <i>Thakur Ishri Singh v. Thakur Baldeo Singh</i> , 10 Cal. 792 (P. C.). |
| | (n) <i>Lakshmi v. Subramanya</i> , 12 Mad. 490; <i>Ramchandra v. Ramabati</i> , 39 Bom. L. R. 165. See also <i>Udai Raj v. Bhagwan</i> , 32 All. 227 (P. C.). |
| | (o) <i>Bheema v. Behari</i> , 44 Mad. 733 (P. C.). |
| | (p) <i>Din Tarini v. Krishna Gopal</i> , 36 Cal. 149. |

(f) One J. K. Mody died in hospital. Among the papers was found a writing as follows:—"To the Agents, Asian Assurance Co. Ltd. Policy No. 8180 and 1927. The above policies should be assigned to S. M. The assignment is valid if the party is not living or otherwise the moneys will go to the parties concerned. J. K. Mody" The writing was attested. (Sd.) J. K. Mody

Held:—The writing was a will (See Bombay Law Journal, 1941, p. 299).

Form of will.—A will may be in any form, but to be effective it must be in the form required by this Act; it is not necessary that it should be of a testamentary form in order to operate as a will(*p*), but there must in all cases be the *animus testandi*, i.e., the intention that the writing should operate as a will. Thus agreements, letters, bills of exchange, powers-of-attorney, a Vyavasta Patra (deed of settlement)(*q*), a Sambandha Niraya Patra (a matrimonial arrangement deed), a Tamliknama (assignment), an Ekranama (deed of agreement) and other instruments may take effect as wills, if duly executed, where a testamentary intention can be collected, and the dispositions are not to take effect until after the death of the person making them(*r*). It is very often contended that a deed and especially a deed of gift or a deed of family settlement(*s*), which is inoperative for want of stamp or registration or other prescribed formalities should operate as a will. But in order that a document should have the effect of a will, it must satisfy the following two tests:—

(1) That it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will, i.e., the writer had the *animus testandi*. A will though formally executed as such, will not be valid, if there were no *animus testandi*, e.g. if it was written in jest(*t*).

(2) That death was the event that was to give effect to it. If the writing confers or is intended to confer benefits *inter vivos*, without any reference to the death of the party conferring it, it cannot be established as a will(*u*). (William's on Executors, 12th Edn., pp. 62-63).

Language of Will.—A will may be written in any language and no technical words are necessary(*v*). Only the wording shall be such that the intention of the testator can be known therefrom (sec. 74). A will may be written with any material—ink or pencil. It may be partly in ink and partly in pencil(*w*). But if the will is once written in ink and there are pencil alterations therein, there will be a presumption that the alterations are deliberative(*x*). If the will written in ink contains blank portions which are filled up in pencil before execution the pencil additions will be included in probate(*y*); if in ink they are final and absolute(*z*). It is also not necessary that the testator himself should write the will; it may be written by any person. But if it is written by a person who himself benefits by it, the rule in *Barry v. Butlin*(*a*) must be borne in mind.

Stamp.—Wills and codicils are not required to be stamped. They are exempt from stamp duty.

Different Kinds of Wills.—The Act mentions only two kinds of wills—a privileged will and an unprivileged will.

A "Privileged Will" is a will made by a soldier employed in an expedition, or engaged in actual warfare or by an airman so employed or by a mariner at sea.

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| (p) <i>Din Tarini v. Krishna Gopal</i> , 36 Cal. 149. | All. 344 (P. C.). |
| (q) <i>Ramchandra v. Ramabai</i> , 39 Bom. L. R. 165. | (t) <i>Nichols v. Nichols</i> , 2 Phillim. 180. |
| (r) <i>Robertson v. Smith</i> , L. R. 2 P. & D. 43; | (u) <i>Glynn v. Oglender</i> , 2 Hagg. 428. |
| <i>Habergham v. Vincent</i> , 2 Ves. 204; | (v) <i>Din Tarini v. Krishna Gopal</i> , 36 Cal. 149 at p. 156. |
| <i>Lakshmi v. Subramanya</i> 12 Mad. 490; | (w) <i>Bateman v. Pennington</i> , 3 Moore's P. C. 223; <i>Rymes v. Clarkson</i> , (1809) 1 Phillim. 22. |
| <i>Udai Raj v. Bhagwan</i> , 32 All. 227 (P. C.); <i>Ram Monti v. Ram Gopal</i> , 12 C. W. N. 942; <i>Din Tarini v. Krishna</i> , 36 Cal. 149; <i>Thakur Ishri Singh v. Thakur Baldeo Singh</i> , 10 Cal. 792 (P. C.). | (x) <i>In the Goods of Adams</i> , (1872), P. & D. 367. |
| (s) <i>Umrao Singh v. Lachhman Singh</i> , 33 | (y) <i>Kell v. Charmer</i> , 23 Beav. 195. |
| | (z) <i>Hawkes v. Hawkes</i> , 1 Hagg. 322. |
| | (a) 2 Moo. P. C. 460. |

An "Unprivileged Will" is a will made by a person, not being a soldier or airman employed in an expedition or engaged in actual warfare or a mariner at sea. This is the ordinary will.

Nuncupative or Oral Will.—An oral or nuncupative will is a will declared by a testator before a sufficient number of witnesses. The word "nuncupative" is derived from *nuncupando* meaning naming, because when a man makes a nuncupative will he must name his executor and declare his whole mind before witnesses. There is no scope for this kind of will under the Succession Act but in place where the act does not apply a will can be made orally(*t*). It is, therefore, not competent for any person governed by this Act to make a nuncupative will. But Hindus not governed by the Hindu Will's Act were competent to make oral wills(*e*); but the law is amended by Act XVIII of 1929. Mahomedans are still competent to make oral wills. The onus of establishing an oral will is very heavy. It is the duty of the person propounding an oral will to prove the exact words used by the testator(*d*).

Holograph Will.—A holograph will is a will which is written by the testator himself. Such a will is included in the above definition of an unprivileged will. A holograph will may show indication that the testator was fully conscious of what he was doing and will not be easily set aside(*e*).

Inofficious Will.—A will which is not consonant with the testator's natural affection and moral duties is called an inofficious will(*f*). An inofficious will may throw some light upon the question of testator's condition of mind(*g*).

Mutual Will.—A mutual will is one of two testamentary documents made respectively by two persons giving each other similar rights in each other's property. It implies two separate wills executed on the same day containing similar provisions. Two persons may agree to make mutual wills which remain revocable during their joint lives by either of them with notice to the other. The peculiar characteristic of this kind of wills is, that they become irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other(*h*). But in *Gray v. Perpetual Trustees Co. Ltd.*(*i*) it was held that in the absence of a definite agreement not to revoke, the wife who survived the husband and who had taken the benefit under the husband's will was not precluded from making a fresh will inconsistent with her former will. It was the case of a mutual will made by a husband and wife giving to each other a life interest with similar provisions in the remainder. Every will is revoked by the marriage of the maker (sec. 69); but where two persons make mutual wills, the marriage of one of them does not revoke the will of the other(*j*).

Joint Will.—A joint will is a will made by two or more testators contained in a single instrument duly executed by each testator disposing either of their separate properties or their joint property (Halsbury Vol. 34 p. 17). By a joint will is meant a single instrument by which two persons give effect to their testamentary wishes. Such a will is not a single will and is revocable at any time by either of them or by the survivor(*k*). But in certain cases it will be enforced in equity as contracts(*l*).

(b) *Kalian Singh v. Sanwal Singh*, 7 All. 163.

(c) *Crinicasammal v. Vijayammal*, 2 M. H. C. R. 37; *Hari Chintaman v. Moro Lakshman*, 11 Bom. 89; *Subbaya v. Surayya*, 10 Mad. 251; *Shivappa v. Rudrava*, 57 Bom. 1.

(d) *Temple of Shri Madan Mohanji v. Kishna Kuar*, (1939) A. L. J. 1001; *Ishar Fatima Bibi v. Anwar Fatima Bibi*, (1939) A. L. J. 642; A. I. R. (1939) A. 348.

(e) *Santasila Dasi v. Narendra Nath*, 56 Cal. 55.

(f) *Prasannamayee v. Baikuntha*, 49 Cal. 132.

(g) *Harwood v. Baker*, 3 Moo. P. C. 282.

(h) *Dias v. De Livera*, 5 App. C. 123 (P. C.); *Dufour v. Pereira*, 1 Dick. 419; *Minakshi v. Viswanath*, 33 Mad. 406.

(i) (1928) A. C. 391.

(j) *Hinckley v. Simmons*, 4 Ves. 160.

(k) *Hobson v. Blackburn*, 1 Add. 274.

(l) *Dufour v. Pereira*, 1 Dick 419.

Dufour v. Pereira decided that where there is a joint interest, on the death of the first testator the position as regards that part of the property which belongs to the survivor is, that the survivor will be treated as holding the property on trust to apply it so far as to carry out the effect of the joint will. If the survivor takes a benefit conferred on him by the joint will he will be treated as a trustee and will not be allowed to do any thing inconsistent with the provisions of the joint will. The decision in the case was applied in *In re Hagger, Freeman v. Arscott*(m), in which case a husband and wife made a joint will whereby they left certain property to the survivor for life with remainder over and they agreed that the will should not be revoked without their mutual consent. The wife died first and then the remainder man died and then the husband. A question arose whether the bequest in remainder lapsed and it was held that it did not. A joint will is valid so far as regards the property of each testator, and will be entitled to probate on his death, unless it is to take effect on the death of all the joint testators. Ordinarily it is required to be proved on the death of each and probate may be granted on the death (*Coote's* of the first dying and again on the death of the survivor(n). *Probate Practice*, 15th Edn. 34).

It is competent for two Hindus to make a joint will(o).

Examples

Two Hindu brothers A and B who were members of a joint family executed a document in order to avoid future disputes concerning their property in the following words, " declaration which shall be binding on ourselves and our representatives, that in the event of one party dying without male issue, the name of his widow shall be entered in the public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever." There were other provisions in the document if both the parties died without male issue. At the time of execution each had a wife and each had daughters but neither had a son. A died. B contended that the document had no legal effect and he claimed the whole property. The widow of A contended it was a joint will. Held by the Lower Court that it was a joint will(p); but on appeal to Privy Council, Held that the document was not a joint will(q).

Contingent or Conditional Will.—A will may be made contingent upon the happening of an event, so that if the event does not happen the will has no effect(r), e.g., where the will contained the following clause, "should anything happen to me during my passage to Wales or during my stay" it was held to be a will(s). It will take effect only if the contingency happens; if the contingency does not happen the will is not entitled to probate. (See Mortimer on Probate p. 285). No evidence is admissible to show that the testator intended that it should be operative after the time for the performance of the conditions has expired(t). In order that a will should be regarded as conditional or contingent it must plainly appear from the terms of the will that its provisions were intended to take effect only in the event of the happening of the contingency and not otherwise, e.g., a testator being about to travel makes a will in the following words :—"This is to take effect if I do not return from the voyage on which I am now starting." The testator returns home and dies. The will has no effect and is not entitled to probate(u). The usual expression used by a testator in this country that he is led to make the will by reason of uncertainty

(m) (1930) 2 Ch. 190.

(n) *In the goods of Stracey*, 1 Dea. & Sw. 6; *In the goods of Raine*, 1 Sw. and Tr. 144; *In the goods of Lovegrove*, 2 Sw. and Tr. 453.

(o) *Minakshi v. Viswanatha*, 33 Mad. 406; *Jethabhai v. Parshottam*, 45 Bom. 987.

(p) *Lakshmi Chand v. Musammat Anandi*, 45

All. 245.

(q) 48 All. 313 (P. C.).

(r) *Roberts v. Roberts*, 2 Sw. and Tr. 337.

(s) *Roberts v. Roberts*, 31 L. J. P. 46; *Parsons v. Lanoe*, 1 Ves. Sen. 189; *Sinclair v. Hone*, 6 Ves. 607.

(t) *Roberts v. Roberts*, supra.

(u) *Parsons v. Lanoe*, 1 Ves. Sen. 189.

of life is not to be deemed conditional, (see Mortimer on Probate p. 286). A will may be made conditional on the assent of a third person to its provisions and if that assent is withheld the instrument is not entitled to probate(v).

Example

A will recited that it was executed by the testator on the eve of his visit to the Delhi Darbar as follows :—" I am going to Delhi for the Darbar, therefore, I am writing the following conditions about my property. I hope that by the grace of God such an occasion will not arise, but strange is the course of time." The testator went to the Delhi Darbar and returned and died after several years. It was contended that the testator intended his will to have a limited operation and that the reference to the visit to Delhi showed that the operation of the will was to be limited to the occurrence of his death during that visit and that it was contingent. *Held*, that the will was not contingent(w).

Duplicate Will.—A will may be made in duplicate. But where the will is executed in duplicate, one of which the testator retains while he deposits the other in the custody of another, the destruction of the duplicate in the testator's possession revokes the whole(x).

3. (1) The Provincial Government may, by notification in the Official Gazette, either retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the Province, or of any

Power of Provincial Government to exempt any race, sect or tribe in the Province from operation of Act.

part of such race, sect or tribe, to whom the Provincial Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

(2) The Provincial Government may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865, under section 332 of that Act are in this Act referred to as "exempted persons."

[This section corresponds to section 332 of Act X of 1865. Clause 3 is new. See Notes on Clause].

This section empowers the Provincial Government to exempt any community from the operation of sections relating to domicile, marriage, intestate succession, testamentary succession, execution of wills, rules of construction and grants.

The following classes have been exempted from the operation of the whole Act retrospectively.

- (1) All Native Christians in the Province of Coorg (see Notification No. 204 dated 23rd July 1868 in the Gazette of India 1868, p. 1094.)
- (2) Jews of Aden (see Notification No. 165/dated 20th November 1886 Gazette of India 1886 p. 707.)
- (3) Members of races called Khasias and Syntengs in Assam (See Notification No. 1671 Gazette of India 1877, p. 512, Assam).
- (4) Mundas, Oraons, Santals, Hos, Bhumij, Khasias, Ghasis, Gonds, Khonds, Kokawas, Kurmies, Malgunie, and Pans dwelling in the Provinces of Bihar, and Orissa (See Notification No. 550 Home Department (Judicial) Simla dated 2-5-1913).

(v) *Re Smith*, (1869) 1 P. and D. 717.

(w) *Jagannath v. Rambharosa*, 60 I. A. 49;

35 Bom. L. R. 230; 38 Bom. L. R. 776.

(x) *Seymour's case*, 1 P. W. 346, 2 Vern. 742.

PART II.

Of Domicile.

Application of Part. 4. This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(This section is new.)

This section excludes from the application of this Part Hindus, Mahomedans, Buddhists, Sikhs and Jains. The words "Sikhs" or "Jains" are new and have been added for the reasons mentioned in the Notes on Clauses. It is stated therein that "this and other similar sections may need to be qualified if and when the Special Marriage (Amendment) Bill which has just been passed by the Indian Legislature, becomes law." That Act is now passed. (See Act XXX of 1923). By sec. 24 of that Act if a Hindu, Buddhist, Sikh or Jain marries under that Act (Special Marriage Act), Succession to his property will be governed by this Act. To such persons, therefore, this Part will apply. But though these classes are excluded from the operation of the sections on domicile, in the absence of any other law governing the question of domicile, the principles laid down in the sections, embodied in this Part would be applied(a).

Law regulating succession to deceased person's immoveable and moveable property respectively.

5. (1) Succession to the immoveable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations

(i) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(ii) A, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

[This is sec. 5 of the Succession Act X of 1865.]

Section 5 applies in case of testacy as well as intestacy, *i.e.*, if a person of foreign domicile dies leaving a will respecting immoveable property in British India. Succession to such property shall be by the law of British India.

What is Domicil.—The word "domicil" is not defined in this Act. It is defined in *Halsbury, Vol. VI*, p. 198 as under.—"A person's domicile is that country in which he either has or is deemed by law to have his permanent home." In its ordinary meaning domicile means the place where a man lives or has his home. Lord Wensledale in *Whicker v. Hume*(b) gives the following definition: "Habitation (by a man) in a place with the intention of remaining there for ever unless some circumstances should occur to alter his intention." The domicile of a person is

(a) *Kashiba v. Shripat*, 19 Bom. 697; *Bhaurao v. Lakshmibai*, 20 Bom. 607. (b) 7 H. L. C. 164.

where he has his true fixed permanent home to which he intends returning. By permanent residence is meant the residence to which no definite limit of time can be assigned. Two things are essential to constitute domicile—(1) residence and (2) intention of making it the home. No person can be without a domicile and must have a single domicile for the purpose of succession(c), it should not be confused with nationality(d).

Classification of Domicil.—Domicil has been classed under three heads—(1) By birth : This is called domicile of origin : (Secs. 7 & 8); (2) By choice : (Secs. 10, 11, 12, 13) ; (3) By operation of law : (Secs. 14, 15, 16, 17 & 18). A person can only have one domicile (sec. 6).

Sub-sec. (1)

Succession to Immoveables.—"Immoveable property" in the General Clauses Act X of 1897 includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Under the Transfer of Property Act IV of 1882 "immoveable property" does not include standing timber, growing crops or grass. Under the Indian Registration Act XVI of 1908 "immoveable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth but not standing timber, growing crops nor grass.

An equity of redemption is immoveable property within the meaning of the Transfer of Property Act(e). A mortgage debt is immoveable property(f).

According to this sub-sec. succession to the immoveables in British India shall be regulated by the law of British India but not the question relating to the status of the parties. Status is decided by the law of domicile(g). This is in accordance with the principles of international law that the succession to immoveable property of an intestate is determined by the *lex loci rei sitae*, i.e., by the law of the land, and not by the law of the domicile of the owner(h). Similarly if a person dies leaving a will disposing of immoveable property the validity of such will so far as it affects immoveable property is determined in every respect as regards the capacity of the testator, the form of the will, its execution etc. by the *lex loci rei sitae*. (Halsbury's Laws of England Vol. VI p. 241.) Accordingly even in the case of a person governed by this Act if such person dies leaving immoveable property outside British India succession to such property will be determined by *lex loci rei sitae*(i). Thus a will of immoveable property in British India must comply with the provisions of this Act(j). Also the construction of a will of immoveable property is, as a general rule, governed by the *lex loci rei sitae*(k).

There is, however, an exception to this rule in case of a foreign or feudatory state. If such a state holds immoveable property and if there is no prohibition by international law to such holding the rule laid down in this section does not apply(l).

Sub-sec. (2)

Succession to Moveables.—In the General Clauses Act X of 1897 moveable property means property of every description except immoveable property. There is no definition of moveable property in the Transfer of Property Act. In the

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| (c) <i>Udny v. Udny</i> , (1869) L. R. H. L. Sc. 441; | (g) <i>Ratanshaw v. Bamonji</i> , 40 Bom. L. R. 141. |
| <i>Somerville v. Somerville</i> , 5 Ves. 750. | (h) <i>Bhaurao v. Lakshmi Bai</i> , v. 20 Bom. 607; |
| (d) <i>Thomas Edmund v. Hugh Carey</i> , 62 Cal. 869. | <i>Kershaji v. Kaikhushru</i> , 31 Bom. L. R. 1081. |
| (e) <i>Mahalatu v. Kusaji</i> , 18 Bom. 739; | (i) <i>Umayal Achi v. Lakshmi Achi</i> , A. I. R. (1944) M. 340. |
| <i>Parashram v. Govind</i> , 21 Bom. 226; <i>Kanti Ram v. Kumbuddin</i> , 22 Cal. 33. | (j) <i>Bhaurao v. Lakshmi Bai</i> , <i>supra</i> . |
| (f) <i>Sakhinuddin v. Sonawallah</i> , 22 C. W. N. 641; <i>Perumal v. Perumal</i> , 44 Mad. 196. | (k) <i>Lushington v. Sewell</i> , (1827) 1 Sim. 435. |
| <i>Parashmath v. Nabagopal</i> , 29 Cal. 1 F.B. | (l) <i>Hajon Manick v. Burr Sing</i> , 11 Cal. 17. |

Indian Registration Act, moveable property includes standing timber, growing crops and grass, fruits upon and juice in trees and property of every description except immoveable property.

Succession to the moveables of a person deceased is regulated by the law of the country in which the deceased had his domicile at the time of his death. The Courts will have to determine two questions in such a case : (1) In what country was the person domiciled at the date of his death and (2) what was the law that the country of domicile applied to such a person.

Though the right to succession to the moveable property is to be regulated by the law of the domicile, still if a person whose domicile is not in British India dies leaving moveable property in British India, the *administration* of that property and its application towards the payment of his debts is to be regulated by the law of British India. The executors or administrators of such person in British India may, after discharging all the debts of the deceased, transfer and hand over the surplus or residue to the executors or administrators (if any) of the foreigner in the country of domicile with their consent. instead of themselves distributing the surplus or residue to the persons entitled thereto, (sec. 367).

First Question.—*In what country was the person domiciled at the date of his death?* Every person has one domicile from the date of his birth to the date of his death (sec. 6). As soon as a person is born the domicile of his father attaches to him or her. This is called domicile of origin (sec. 7). But a man can give up his domicile of origin and acquire a new domicile by taking up his fixed habitation in another country (sec. 10). This is called domicile of choice. If, therefore, any one wants to prove that the deceased had acquired a domicile of choice in a country other than that of the domicile of origin the onus of such proof lies on such person^(m).

Second Question.—*What was the law which the country applied to such person at the date of his death?*—This involves two propositions—the law which the country of domicile applies to its own subjects, *i.e.*, municipal law, and the law which that country applies to foreigners domiciled in such country by international conventions. The question whether “the law of the country of domicile” would include the rules of private international law as applied and recognised by the two countries is not free from doubt and the decisions are conflicting. The earliest case is *Collier v. Rivaz*⁽ⁿ⁾. There a British subject domiciled in Belgium had executed a will with the formalities required by English law but not in accordance with the formalities of the Belgian law. It was proved by expert evidence that by private international law the Belgian Courts would uphold the will and the will was upheld. In *Bremer v. Freeman*^(o) a British subject domiciled in France made a will in France in English form dealing with the bulk of her moveables situate in England. The testatrix had not obtained from the French Government an authorization to acquire a French domicile and according to the French Municipal law the will was bad. Sir John Dodson sitting in the Probate Court, following *Collier v. Rivaz*, admitted the will to probate but his decision was reversed by the Privy Council and the will was held to be bad. But in *In the Goods of Lacroix*^(p) a will made by an Englishman domiciled in France made in English form was admitted to probate. In *In re Ross, Ross v. Waterfield*^(q) an Englishwoman whose domicile of origin was English but who at the date of her death was a widow, domiciled in Italy, by her will excluded her son (and only child) from any participation in her moveable and immoveable property situate in Italy and in her moveable property situate elsewhere. The son filed a suit claiming his legitimate portion (one half) according to the Italian law. It was held that the question whether the son was entitled to a moiety of her estate as his *legitima portio* must be decided

(m) *Thomas Edmund v. Hugh Carey*, 62 Cal. 369.

(n) 2 Curt. 855.

(o) 10 Moo. P. C. 306.

(p) (1877) 2 P. D. 94.

(q) (1880) 1 Ch. 377.

in accordance with the view that the Italian Courts would take of the English law. It was further held that, although in the case of Italians the *legitima portio* would apply, still in the case of a foreigner domiciled in Italy the Italian Courts would hold the testamentary disposition valid and the son's claim was negatived. As regards the immoveable property situate in Italy also it was held that *lex situs* applied and the evidence showed that the Italian Courts would decide the question in the same manner as the English Courts would determine and the son's claim failed. Luxmoore J. in his judgment at page 402 refers to the dictum of Scrutton, L. J., in *Casdagli v. Casdagli*(r): "Practical and theoretical difficulties arise from the fact that while England decides questions of status in the event of conflict of laws by the law of the domicile, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicile, and the country of domicile looks to or sends back (*renvoyer*) the decision to the law of nationality, there is an inextricable circle in the 'doctrine of the *renvoi*' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicile would apply to such a case if arising in its Courts, it may well apply its own law to the subject-matter of dispute, being that which the country of domicile would apply, but not that part of it which would remit the matter to the law of domicile, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicile says, 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.'" This rule was to some extent qualified in *In re Askew*(s). Relying on this decision in *Kotia v. Nahas*(t), Lord Justice Clauson held "that in the English Courts phrases which refer to the national law of the propositus should *prima facie* to be construed not as referring to the law which the Courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country but to the law which the Courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant)". *In re O'Keefe*(u) is a peculiar case. O'Keefe a spinster died intestate in Naples. She was born in India but had lived in Italy for 47 years. Her father was born in Ireland. The Court held that she had acquired a domicile of choice in Italy at the time of her death but that she had never acquired Italian nationality, the Court having held that her nationality was British. The question was by what law her moveable estate was to be administered whether by the law of Eire (Free Ireland) or by English law or by the law of British India. It was held that the law applicable for the distribution of her estate was the law of Eire applicable to a person dying intestate domiciled in Eire. In *Ratanshaw v. Bomanjee*(v) a Parsi domiciled in the Baroda State died intestate leaving immoveable property in British India. The deceased had divorced his wife Hirabai by executing a release which form of divorce was valid in the state but not valid in British India. He had a daughter by Hirabai. He had thereafter married a second and a third wife. It was held that Hirabai's divorce could not be recognised and the succession to the immoveable property should be according to the law of British India and the share of Hirabai's daughter was recognised.

Succession to Moveables in case of Intestacy.—The law of the domicile of the country is to be applied whether the person dies intestate or whether he leaves a will. In case of intestacy the law of domicile at death determines who is entitled to succeed to the moveables of the deceased, *e.g.*, if by the law of domicile children,

(r) (1918) P. 89; (reversed in appeal by House of Lords) 19 19 A. C. 145.
(s) (1930) 2 Ch. 259.

(t) A. I. R. (1941) P. C. 189.
(u) (1940) 1 Ch. 124.
(v) 40 Bom. L. R. 141.

whether legitimate or illegitimate, are entitled to succeed their claim will be enforced(w). In the absence of proof of domicile elsewhere if a person dies in British India, succession to his moveable property is governed by the law of British India (sec. 19).

Succession to Moveables in case of will.—In case of will of moveables the validity thereof will depend in general upon the law of the domicile of the deceased at the date of his death. If by the law of domicile a testator's capacity to dispose of the moveables is restricted effect will be given to the same. In *Bartlett v. Bartlett*(x) a Moslem British subject domiciled in Egypt died in 1918. possessed of property which was all in Egypt. He was survived by his mother who according to the Mahomedan law was entitled to a one-sixth share. The deceased had executed a will in the English form leaving all his property to his widow and children. It was held that the testator had no testamentary power over the share to which his mother was entitled. If on the other hand the testamentary capacity is increased by the law of domicile of the testator effect will be given to the same(y).

Form of Wills of Moveables.—According to the Wills Act 1861 (24 & 25 Vict. c. 114 sec. 1) a will of moveables outside the United Kingdom by a British subject is valid in point of form if made in accordance with the forms required either by the law of the place where the testator was domiciled at the date of execution or by the law then in force where the person had his domicile of origin. By sec. 2 of the same Statute a will of moveables made within the United Kingdom by a British subject whether natural born or naturalized is valid in point of form if made in accordance with the law at the time in force in the place where it was made.

Construction of Wills of Moveables.—Wills of moveables must be construed with reference to the law of the place which was the testator's domicile at the time of his death (Halsbury's Laws of England Vol. VI p. 253). If technical expressions peculiar to foreign law are used that law should determine the meaning of such expression(z).

Example

A, a British subject domiciled in France made a will in English form whereby he bequeathed the residue of his estate consisting of moveables to be divided equally between ten named legatees and if any of such legatees died in his lifetime the legacy was to belong to the issue of such person. The testator died in France and his will was admitted to probate in England. Two of the residuary legatees died in his lifetime leaving no issue. The residuary legatees were all English. The testator's domicile at the date of his death was held to be French. According to English law the legacy of the two named legatees lapsed but by French law there was no lapse. Held that the will must be construed by French law and the whole residue went to the eight surviving legatees(a).

Revocation of Wills of Moveables.—By 24 & 25 Vict. c. 114 s. 3 no will shall be held to be revoked or to have become invalid by reason of any subsequent change of domicile of the person making the same. There is no such provision in the Indian Succession Act. Under sec. 69 of this Act a will made by a testator previous to his marriage is revoked by the subsequent marriage of the testator. But if by the law of the domicile of the testator marriage does not revoke the will, effect will be given to it(b).

One domicile only
affects succession
to moveables.

6. A person can have only one domicile for the purpose of the succession to his moveable property.

[This is sec. 6 of the Succession Act X of 1865.]

(w) *Doglioni v. Crispin* (1866), L. R. I. H. L. 301.

(x) (1925) A. C. 377.

(y) *In re Groos, Groos v. Groos* (1915), 1 Ch. 572.

(z) *Studd v. Cook* (1883), 8 App. Cas. 577.

(a) *In re Cunningham, Healing v. Webb* (1924), 1 Ch. 68.

(b) *In re Groos, Groos v. Groos*, (1915) 1 Ch. 572; *In the estate of Jeanne Theodora Groos* (1904) P. 269.

This section is based on the case of *Somerville v. Somerville(c)*. Although a person may have more than one domicile for some purposes, but for the purposes of succession to moveable property he has only one domicile. If a man has more residences than one, the place where he resides with his wife and family will be considered his place of domicile(d).

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth, his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Domicile of origin of person of legitimate birth.

Illustration

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

[This is sec. 7 of the Succession Act X of 1865.]

Domicil by Birth.—In *Udny v. Udny(e)*, Lord Westburn said, “It is a settled principle that no man shall be without a domicile and to secure this result law attributes to every child as soon as he is born the domicile of his father, if the child is legitimate and the domicile of his mother if illegitimate.” In case of a posthumous child, it is the domicile of the country in which his father was domiciled at the time of the father's death. In England it is otherwise, it is the domicile of the mother at the time of the child's birth. This is called “domicil by birth” or “domicil of origin.” It is a creation of law, whereas domicile of choice is created by the party. It is not in itself local, *i.e.*, by it is not meant the place of birth of the child for by mere accident a child may be born on a journey in a foreign country, but the country in which at the time of the birth of the child his father is domiciled, if the child is legitimate and, if the child is illegitimate, the country in which at the time of his birth his mother is domiciled. The place where the child is born is immaterial. The domicile of origin once ascertained in law clings and adheres to the person until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin(f).

The legitimacy of a child depends upon the law of domicile by birth(g).

Domicile of origin of illegitimate child.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

[This is sec. 8 of the Succession Act X of 1865.]

Continuance of domicile of origin.

9. The domicile of origin prevails until a new domicile has been acquired.

[This is sec. 9 of the Succession Act X of 1865.]

When a domicile of choice is acquired the domicile of origin remains in abeyance. It is not absolutely extinguished. When the domicile of choice is abandoned the domicile of origin revives(h).

Acquisition of new domicile.

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

(c) 5 Ves. 750.

(d) *Forbes v. Forbes*, Kay 341.

(e) 1 H. L. Sc. 441.

(f) *Santos v. Pinto*, 41 Bom. 687.

(g) *Re Goodman's Trusts*, 17 Ch. D. 266.

(h) *Udny v. Udny* (1869), 1 H. L. Sc. 441.

Explanation.—A man is not to be deemed to have taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil, military, naval or air force service, or in the exercise of any profession or calling.

Illustrations

(i) A, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(iii) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the Central Government for a certain number of years. It is his intention to return to France, at the end of that period. He does not acquire a domicile in British India.

(iv) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(v) A, having gone to reside in British India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(vi) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(vii) A, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

[This is sec. 10 of the *Succession Act X of 1865*. The words "military or air force" are substituted for the word "military" by *Act X of 1927*. (*Repealing and Amending Act*). The word "naval" is inserted by *Act XXXV of 1934 Schedule*].

Domicil by Choice.—A domicil of choice is acquired by a combination of fact with intention. The fact is residence and the intention is that the residence should be permanent(*i*). It is the taking up of a fixed habitation that determines the acquisition of new domicil. A domicil of choice is the creation of the party. The domicil of origin is the creation of law, and, when a party creates a new domicil, the domicil of origin remains in abeyance. It is not extinguished. To constitute such a change of domicil it must be both *animo et facto*(*j*). Mere residence in a new place however long is not enough, it must be both residence and intention, *i.e.*, the residence must be accompanied by an intention of *permanently* (the word used in the section is *fixed*) residing in the new domicil with the intention of abandoning his domicil of origin(*k*). If the domicil of choice is abandoned without acquisition of another, the domicil of origin revives without the need of any further act or intention on the part of the person. The onus lies on a person who alleges the change of domicil, otherwise the domicil of origin will prevail (sec. 9).

As regards proof of acquisition of domicil of choice the length of residence is a very strong ground for inferring, in the absence of express intention, an intention to make a residence a fixed habitation or permanent home. It is on a party who relies on a change of domicil to prove that such a change has taken place and to do this he must show a double intention of abandoning his domicil of origin and the intention of adopting the domicil of choice(*l*). No new domicil is obtained

(i) *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307,

(j) *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285.

(k) *Thomas Edmund v. Hugh Carey*, 62 Cal.

869; *Moorhouse v. Lord*, 10 H. L. Cas. 272.

(l) *Hall v. Hall*, Ind. Rul. (1933) Sind 132.

without a clear intention of abandoning the old(*m*). In every case it is a question of fact, though the decisions are varied and confusing, (see *Santos v. Pinto*, *supra*, where the subject is fully discussed). In the case of a person residing in India the onus lies on the party alleging foreign domicile to prove the domicile of origin. If once the domicile of origin is proved then it lies on the party alleging domicile of choice to prove the domicile of choice(*n*).

Examples

(1) A, a Native Christian born in Goa of parents domiciled in Goa, at the age of 14 came to Bombay and lived in Bombay uninterruptedly with the exceptions of brief visits to Goa. He died at the age of 71, leaving a will executed in Bombay whereby he gave a legacy of Rs. 7 per month to his widow (plaintiff) and the residue to defendant which consisted of moveables. The plaintiff disputed the will on the ground that the testator had Portuguese domicile at his death and under the Portuguese law she was entitled to a moiety. *Held* that when the deceased attained majority he had acquired a domicile of a choice in Bombay in substitution of the domicile of origin in Goa, that there was no intention to abandon and there was no actual abandonment of the domicile of choice and the will was valid(*o*).

(2) A, born of British parents in England in 1854, came to India in 1880 to serve as a missionary and except for visits to England on leave for 6 months in 1888, 1894, 1901, 1907, 1911, 1914 and 1920 he lived in Calcutta continuously for 52 years until his death in 1938. By his will he made certain bequests to religious and charitable uses which would be void under sec. 118 if his domicile was Indian at the time of his death. *Held* that the testator had an Indian domicile by choice and was governed by the Act and the bequest was void(*p*).

Explanation.—*Anglo Indian Domicil.* An exception to the ordinary rules governing the acquisition of a domicile of choice formerly existed in the case of British subjects in the service of the East India Company residing in India for a period of service that was not fixed. An Indian domicile was considered to have been acquired by such subjects by mere residence in India without regard to the actual state of mind accompanying it and in spite of the fact such servants definitely looked forward to their return(*q*). Entering service with the East India Company formerly had the effect of changing the domicile. The grounds on which the decision in *Bruce v. Bruce* was based has not been altered by the transference of the Government from the East India Company to the Crown(*r*). By the Government of India Act 1858 (21 & 22 Vict. c. 106 s. LVIII) this is changed, (*Halsbury*, Vol. 6, pp. 207-208). The Explanation to this section is intended to give effect to that change. A servant in the civil, military or naval service of the Crown in British India shall not be deemed to have lost his domicile of origin by reason of his taking up a fixed habitation for however long a period. He is put in the same position as any other man and if one alleges a change of domicile, the onus will lie on him to prove it. And this rule applies to an acquired domicile as well as to a domicile of origin(*s*).

11. Any person may acquire a domicile in British India by making and depositing in some office in British India, appointed in this behalf by the Provincial Government, a declaration in writing under his hand of his desire to acquire such domicile: provided that he has been resident in British India for one year immediately preceding the time of his making such declaration.

[This is sec. 11 of the Succession Act X of 1865.]

(*m*) *Landerdale Peerage Case*, 10 A.C. 692.

(*n*) *Bonnaud v. Emile*, 32 Cal. 631.

(*o*) *Santos v. Pinto*, 41 Bom. 687.

(*p*) *Thomas Edmund v. Hugh Carey*, 62 Cal. 869.

(*q*) *Bruce v. Bruce* (1790), 2 B. & P. 229; *Jopp*

v. Wood, 34 L. J. Ch. 212; *Att.-General v. Napier*, 6 Exch. 217, *Forbes v. Forbes*, (1854), Kay 341.

(*r*) *Wauchape v. Wauchape*, 1887, 4 R. 945 2 C. L. R. 499.

(*s*) *In re Macreight*, 30 Ch. D. 165.

The words "Provincial Government" have been substituted for the words "Local Government" by Government of India (Adaptation of Laws) Order 1987. This section is omitted by Crown Representation Order for the Punjab State Railway, (See Gazette of India 16-9-39 Part I. A. p. 171).

Section 11 lays down a special mode for acquiring domicile in British India. *i.e.*, by making and depositing in some office in British India a *declaration* to acquire such domicile by a person who shall have been a resident in British India for *one year* immediately preceding the time of his making such declaration.

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first mentioned person as part of his family, or as a servant.

[This is sec. 12 of the Succession Act X of 1865.]

Residence in a foreign country and the intention to make it his permanent place has the effect of acquiring a domicile of choice. This section lays down an exception to this rule. A consul or an ambassador acquires no new domicile in the country in which he resides for the purpose of his office. His own family or his servant who follow him and reside in the foreign country also do not acquire a new domicile, the reason being that there is no intention on the part of such person to make the foreign country his home. But if a man is already domiciled in a foreign country and is appointed an ambassador or consul in that country, he does not lose it by accepting the appointment(t).

Continuance of new domicile. 13. A new domicile continues until the former domicile has been resumed or another has been acquired.

[This is sec. 13 of the Succession Act X of 1865.]

A domicile of choice continues until it is abandoned. It is divested only when the country of domicile has been actually abandoned with the intention of abandoning it for ever. According to English law it is not necessary that another domicile should be acquired. In such a case the domicile of origin which was in abeyance automatically takes effect. But according to this section the domicile of choice will continue until the domicile of origin is resumed both *animo et facto*. According to this section a person who acquired a domicile of choice, cannot resume his domicile of origin by merely abandoning the former but he has got to do something further to resume his domicile of origin.

Minor's domicile. 14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.

[This is sec. 14 of the Succession Act X of 1865.]

Minor's Domicil.—Secs. 14 and 17.—The domicil of a minor follows that of his parent, *i.e.*, of the father if the minor is legitimate (sec. 7) and of the mother if the minor is illegitimate (sec. 8). If the father dies during the minority of his child, the minor's domicil would continue to be of the father. This is not according to English law where if the father dies before the child attains majority, if the child lives with the mother, his domicil is and changes with hers(*u*).

Except If the minor (1) is married, or

(2) Holds any office or employment in the service of His Majesty, or

(3) 'Has set up, with the consent of the parent, in any distinct business.

Law of Father's Domicil.—In *In re Askew*(*v*) Maugham, J., considered the meaning of the expression "law of father's domicil." Does it refer to municipal law or local law of Germany or does it refer to the whole law applicable in Germany, including the views entertained in Germany as to the rules of private international law" and came to the following conclusion. "If the proposition that where a British national dies domiciled in a foreign country, his moveables here must be distributed according to our view of what the Courts of that country would decide in the particular case means that generally speaking we must ascertain the foreign municipal law and also the rules of private international law applied by the foreign country, and then decide the case, I respectfully agree; but if the proposition is to be taken literally, I think there should be a qualification. I do not think an English Court administering the estate of a British national in this country is bound to follow the decisions of all the foreign Courts, however erroneous or unreasonable. I am not convinced that an English Court is bound to accept all the views of a foreign Court on the rules of private international law, when they plainly conflict with our notions of comity. And further there may be legislation in the foreign country directed specifically against persons who are foreigners in that country which an English Court would not be disposed to enforce," (see p. 275 of Report).

Domicile acquired by woman on marriage.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

[This is sec. 15 of the Succession Act X of 1865.]

Wife's domicile during marriage.

16. A wife's domicile during her marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

[This is sec. 16 of the Succession Act X of 1865.]

Married Woman's Domicil.—The doctrine that the domicil of the wife is that of the husband is founded on the duty of the wife to live with her husband. Sections 15 & 16 lay down this law in India. By marriage a woman acquires the domicil of her husband, if she had not the same domicil before. And during marriage the wife's domicil follows that of her husband:

Except (1) Where the husband and wife are separated by the sentence of a competent Court, *i.e.*, either by divorce or by judicial separation(*w*).

(2) If the husband is undergoing a sentence of transportation.

(*u*) *Johnstone v. Beattie*, 10 Cl. & Fin. 42.
(*v*) (1930) 2 Ch. 259 at p. 260.

(*w*) *Dolphin v. Robins*, 7 H. L. C. 390.

According to English law where the husband deserts his wife the wife may acquire an independent domicile.

The widow retains the domicile of her husband after his death, unless she has changed it after his death(x).

The word "sentence" in section 16 means both a decree for divorce and a decree for judicial separation(y) and after a decree for divorce the wife may select her own domicile(z). But if the parties live separate under a deed of separation the exception will not apply(a).

Coupled with the question of the wife acquiring the domicile of her husband is the question also of nationality. In the case of marriage of a British subject with a woman of different nationality the law was uncertain upto 1914. In 1914 the British Nationality and Status of Aliens Act (4 & 5 Geo V. ch. 17) was passed. Upto 1844 the rule was that if a woman of a different nationality married a British subject, it did not affect the nationality of such woman. By sec. 10 of the Act of 1914 it is provided that the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that when a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject. The Act further provides that a woman who having been an alien has by, or in consequence of, her marriage become a British subject, shall not, by reason only on the death of her husband, or the dissolution of her marriage, cease to be a British subject.

By the Indian Naturalization Act (VII of 1926) a British subject means a British subject as defined by sec. 27 of the British Nationality and Status of Aliens Act, 1914. Hence the said Act will apply to India and if an Indian British subject marries an alien, say a German woman, she will be deemed to be a British subject. Whether on the outbreak of war she would be considered an alien enemy came up for consideration lately in the Allahabad High Court. In that case a German woman married a Sikh according to Sikh rites before the outbreak of the war. Her husband having deserted her, she filed a suit for maintenance and a decree was passed in her favour. The husband filed an appeal and pending the appeal, war broke out and the woman was interned as an alien enemy. In appeal it was contended on behalf of the husband that she was an alien enemy. It was held that she was not an alien enemy and she did not cease to follow the husband's domicile(b). (It does not appear from the report that the above mentioned Acts were brought to the notice of the Court).

Minor's acquisition of new domicile.

17. Save as hereinbefore otherwise provided in this Part, a person cannot, during minority, acquire a new domicile.

[This is sec. 17 of the Succession Act X of 1865.]

Lunatic's acquisition of new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

[This is sec. 18 of the Succession Act X of 1865.]

Lunatic's Domicil.—An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person, i.e., if the lunatic is a minor, his domicile follows that of his parent or if a lunatic is a

(x) *Kashiba v. Shripat*, 19 Bom. 697.
 (y) *Dolphin v. Robins*, 7 H. L. C. 390.
 (z) *Mackenzie v. Edwards Moss*, (1911) 1 Ch. 578.

(a) *Warrender v. Warrender*, 2 Cl. & Fin. 488.
 (b) *Prem Pratap v. Jagat Pratap*, (1944) All. 118.

married woman her domicile follows that of her husband. If the lunatic is a major, his domicile cannot be changed either by his own act or by the act of the person having the custody of the lunatic. It remains what it was at the commencement of his lunacy(c).

Succession to
moveable property
in British India in
absence of proof of
domicile elsewhere.

19. If a person dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

[*This is sec. 19 of the Succession Act X of 1865.*]

In the absence of proof of domicile this section raises a presumption of Indian domicile

(c) *Urquhart v. Butterfield*, 37 Ch. D. 357; *Sharpe v. Crispin*, 1 P. & D. 611.

PART III.

Marriage.

20. (1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

Interests and powers not acquired nor lost by marriage.

(2) This section—

(a) shall not apply to any marriage contracted before the first day of January, 1866;

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

[Clause (1) of the section is sec. 4 of the Succession Act X of 1865. Clause 2 (a) and (b) is sec. 331 of the same Act. The words "shall not apply and shall be deemed never to have applied, to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion," are the Married Woman's Property Act, 1874 (III of 1874), s. 2, last paragraph. Taken from sub-clause (b) of clause (2) is taken from sec. 2; last para of the Married Women's Property Act III of 1874 which para is repealed by this Act].

This Part applies to Parsis.

Sub-sec. (1).

This sub-section lays down a general rule and applies only where the marriage takes place in India between persons having an Indian domicile. It does not apply where both the parties are domiciled abroad, although married in British India. Its effect is that no husband shall by marriage acquire any interest in the property of his wife and no wife shall become incapable of doing anything in respect of her own property which she could have done if unmarried. It gives to the wife an independent power to dispose of her property. This section has nothing to do with the power of a married woman to contract. Sec. 4 of the Married Women's Property Act created a further statutory separate property in the case of married women's earnings(a).

This section does not apply to a person whose domicile is not in British India and marries in British India a person whose domicile is in British India; the rights of such persons to each others property are governed by sec. 21.

It should, however, be borne in mind that sections 20 and 21 of this Act relate to the immediate effect of marriage on the wife's property; but the order of succession to such property is not affected thereby(b). Sec. 20 applies to property taken otherwise than by succession and enacts a law peculiar to marriage and has nothing to do with succession whilst the rest of the Act deals with matters of succession and inheritance.

Presents made at the time of marriage.—In *Burjorjee v. Pestonjee*, (not reported) decided on 20-9-1877 Bayley, J., held that a custom was proved

(a) *In re George Bridge*, (1938) 2 Cal. 233 at p. 240. (b) *Shapurji B. Motiwala v. Dossabhoj B. Motiwala*, 80 Bom. 359.

amongst the Parsis that the ornaments, moneys, etc., given in marriage by a husband or his family or relatives to his wife were subject to the joint control of husband and wife during marriage and on the death of either they belonged to the survivor. West, J., has observed in *Merbai v. Perozbai*(c) that it is a matter of common knowledge that presents of large value are given at Parsi marriages and that the custom prevailing amongst the Parsis assigned the control of property thus given to the married pair jointly during their lives and after the death of one of them to the survivor. This custom, however, does not exclude the possibility of a gift for separate use of a married woman or of a woman about to be married. The donor can impose on his bounty the character which he desires in this respect.

Birdwood, J., in 1884 in *Merwanjee v. Rustomjee* (not reported) referring to the decision of Bayley, J., held that the above custom embraced gifts from the bride's side as well as from the husband's. Both these cases are quoted by Parsons, J., in *Byramjee v. Jamsetjee*(d) and he has held that by the custom prevailing amongst the Parsis the presents of ornaments and money made to the bride either by her relatives or by her husband or his relatives at the betrothal and between betrothal and marriage and at marriage and the increment thereof belong to the husband and wife jointly during their lives and on the death of either pass absolutely to the survivor.

But with regard to presents after marriage such as on the occasion of the first pregnancy or birth of first child or the first birthday of first child or on thread ceremony there was no such custom proved and that the same would belong either to the husband or wife to whomsoever the donor wishes the presents to go.

Sub-sec. (2) (a).

This Sub-sec. reproduces the last sentence of section 331 of the Act of 1865 in order to leave the rights which had already been acquired before the first day of January, 1866, unaffected.

Prior to January, 1866, the law applicable to persons—not being Hindus, Mahomedans, Buddhist, Sikhs or Jains—was the English Common law. Europeans, Christians, Jews, Armenians and Parsis were so governed and all the restriction as regards possession and alienation of the property of an English woman applied to them. The law in England before the Married Women's Property Acts were passed was as follows :—

(1) As to real estate the husband acquired by marriage an interest in the immoveable property of his wife and during coverture she could not alienate it without the consent of her husband and in the event of her death leaving children, subject to certain conditions and limitations, the husband became a tenant by courtesy. In the conveyances executed prior to January, 1866, by a Parsi married woman, it will be invariably discovered that the husband was made a party for the purpose of giving his concurrence to the alienation and in the investigation of title to the property, it is one of the requisitions on title to ascertain if the woman was married before the 1st of January 1866 and if so if her husband had given his consent to the sale. This was because by section 3 of Act XXXI of 1854 it was provided that a married woman was empowered to dispose of her estate by deed acknowledged with her husband's concurrence and by sec. 5 it was provided that no deed would be valid unless her husband concurred therein, nor unless it was acknowledged before the Judge of the Supreme Court in case of the disability of the husband.

(2) As regards moveables belonging to the wife, the husband acquired by marriage a vested interest in the personal chattels in the possession of the wife and

(c) 5 Bom. 268 at p. 279.

(d) 16 Bom. 630.

he acquired the right to reduce into possession the wife's outstanding personal choses in action.

During coverture also the wife suffered considerable disabilities in respect of acquisition of immoveable or moveable property. All such restrictions and disabilities were done away with in India by the enactment of section 4 of the Indian Succession Act, 1865, and the rule that husband and wife are one person in law was got rid of. The effect of the enactment of that section is to leave the wife's right to her property unaffected. She can hold and alienate any property belonging to her without the consent of her husband. She can sue and be sued in her own name for any property which is her separate property and her separate property is made liable for all the debts contracted by her either before the marriage or during coverture and for which her husband is not liable.

In 1870 the Married Women's Property Act was passed in England, (33 & 34 Vict. c. 93) and in India Act III of 1874 (Married Women's Property Act) was enacted practically on the same lines. But as the Hindus had their own marriage law, it was not thought desirable by the Legislature to interfere with them. Accordingly it was provided by sec. 2 last clause that sec. 4 of the Indian Succession Act 1865 shall not apply and shall be deemed never to have applied to any marriage one or both parties to which professed at the time of their marriage the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion. This clause was repealed by section 392 Sch. IX of the present Act.

The recitals to the Married Women's Property Act are as follows :—

“ And whereas by the Indian Succession Act, 1865, section 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried :

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by, them, and their husbands do not by their marriage, acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives.”

It is hereby enacted as follows :—

IV.—Legal Proceedings by and against Married Women.

7. A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property ; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes, and orders in respect of such property as she would be liable to if she were unmarried.

8. If a married woman (whether married before or after the first day of January, 1866) possesses separate property, and if any person enters into a contract with her with reference to such property or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree.

Provided that nothing herein contained shall—(a) entitle such persons to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage to transfer or charge the same or her beneficial interest therein, or (b) affect the liability of a husband for debts contracted by his wife's agency expressed or implied.

V.—Husband's Liability for Wife's Debts.

9. A husband married after the thirty-first day of December, 1865, shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried. :

Provided that nothing contained in this section shall invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts.

The combined effect of these enactments is to place a married woman governed by the Succession Act in the same position as an unmarried woman, *i.e.*, she can dispose of her property without any hindrance on the part of her husband and she renders herself liable for her own engagements.

Insurance by Wives and Husbands.—A right was also given by Sec. 5 of the Married Women's Property Act to a married woman (not being a Hindu, Mahomedan, Buddhist, Sikh or Jain) to effect a policy of insurance on her own behalf and independently of her husband ; and that if she did so all the benefit under such policy would be deemed to be her separate property and the contract effected with the insurance company shall be as valid as if made with an unmarried woman. By section 7 of the same Act she was given the right to file a suit in her own name for the recovery of such property. The husband would not be liable for payment of premium under such contract by virtue of sec. 9.

Previously if a wife effected a policy of insurance on her own life or on her husband's life otherwise than by separate property and died in her husband's lifetime, the husband became the absolute owner. Section 5 provided a remedy. That section has laid down a rule that if the wife contracted with an insurance company, the insurance company shall not ask any question to her as to whether the money was her separate property or not, but the insurance company shall be liable to the wife alone.

Insurance by husband for benefit of wife :—A further benefit was conferred and a right was created in favour of the wife and children of a married man by sec. 6 of the Married Women's Property Act. That section was amended by Act XIII of 1923 and as amended it runs as follows :—

“(1) A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Province in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act XVII of 1864, section 10.

Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

(2) Notwithstanding anything contained in section 2, the provisions of sub-section (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Muhammadan, Sikh or Jain in Madras, after the 31st day of December, 1913, or in any other part of British India, after the 1st day of April, 1923:

Provided that nothing herein contained shall affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the 1st day of April, 1923."

In view of the conflicting decisions of the Bombay High Court in *Shanker v. Umabai(e)*, and the decision of the Full Bench of the Madras High Court in *Balamba v. Krishnayya(f)* the Married Women's Property Act was amended by Act XIII of 1923.

By the amending Act of 1923 sec. 6 which was not originally applicable to the policy of insurance effected by a Hindu on his own life for the benefit of his wife and children was made applicable to them in case of policy effected after 31st December 1913 in Madras. The Madras High Court has held that this amendment does not enact that it shall not apply to policies effected before that date.(g)

This proviso to sec. 6 introduced by the amending Act raised the question whether the policies effected in Madras before 31st December 1923 by a Hindu and a Mahomedan for the benefit of his wife and children created a trust. The Madras High Court in the Full Bench case(h) held that it did. Sec. 2 of the Married Women's Property Act did not exempt all Hindus from the operation of sec. 6 but only it effected the rights of a married woman who was the wife of a Hindu. Where, therefore, a policy was effected by a Hindu for the benefit of his daughter a trust was created which was valid and sec. 6 as it originally stood applied and a trust was created in favour of the daughter with respect to the policy moneys against which the creditors of the assured had no right. Unfortunately for the daughter in this case it was held that the daughter was not entitled to enforce her claim against the insurance company or against the creditors as the contract with the insurance company was that the company should pay the amount to the executors or administrators of the assured. The presumption of advancement to daughter alone could not succeed as the words used in the policy were "for the benefit of his wife and children."

This case was followed in *National Insurance Co. v. Sethammal(i)*, and in *Ram Rao v. Krishnayya(j)*.

With regard to Mahomedans also the Madras High Court has held(k) that sec. 6 governs a policy effected by a Mahomedan made for the benefit of his children even before 1913.

The decision in *Balamba v. Krishnayya* was given in December 1913 before the amending Act. In *Abiramavalli v. Official Trustee of Madras(l)* the words inserted in the column of the policy "to whom payable" were "to the assured or his wife if he predeceased her" and it was held that a trust in favour of the wife

(e) 37 Bom. 471.

(f) 37 Mad. 483.

(g) *Rama Rao v. Krishnamma*, 52 Mad. 986.

(h) *Balamba v. Krishnayya*, 37 Mad. 483.

(i) 65 M. L. J. 453.

(j) 52 Mad. 986.

(k) *Ennayattullah v. Jeelane*, A. I. R. (1942) M. 136.

(l) 55 Mad. 171.

was created. Even if the policy itself on the face of it does not show the nomination but if in the proposal form in the column of nomination the words "self or wife" are used, it was held that the proposal should be treated as part of the policy and sec. 6 applied and a trust was created(m). It was also held in this case that a contingent trust, i.e., a trust if the wife survived the husband or the husband dying before the policy matured was a good trust. This was the case of an endowment policy.

The question whether a trust in favour of the wife was created at the inception when the policy of insurance was effected or whether the husband during his life retained the power to deal with the policy came up for consideration in *Eshani Dasi v. Gopal Chandra*(n) and in *Krishna v. Pramila*(o) in which cases it was held that no trust was created by naming the wife as the nominee. In *Lalithambal v. Guardian of India Insurance Co. Ltd.*(p) the same view was adopted. In this case the words under the column "For whose benefit" were "the assured or his wife if he predeceased her". Ten days after effecting the policy the assured by an endorsement assigned the policy to the Travancore National Bank. On the death of the assured the widow claimed the money but her claim was negatived. It was held that so long as the assured was alive, he was not in any way fettered by any trust and that the trust would only arise on the death of the assured. This case has been criticised in the subsequent decisions and has not been followed by the Calcutta High Court.

In *Bengal Ins. Real Property Co. Ltd. v. Velayammal*(q) the widow of a deceased Hindu sued the company which had its head office in Calcutta in the Coimbatore Court. In the declaration of the policy the following words were inserted in the column "name of nominee", "self or wife" showing that the policy was for the benefit of the assured or his wife. The premium was paid by the husband who died in Bangalore. Under the terms of the policy the moneys were payable in Calcutta. It was held that no part of the cause of action arose within the jurisdiction of the Coimbatore Court but as the company had put in the defence and was not prejudiced by the trial, the decree passed against the company in favour of the widow could not be interfered with, that a trust was created by sec. 6 and the Official Trustee of Bengal would be the trustee and he alone would be competent to sue for the enforcement of the trust. But under O. VIII r. 2 of the Code of Civil Procedure the company could not be allowed to raise a defence which it did not take in the written statement and that the widow was entitled to the policy money absolutely. This case was followed in *In re Asha Lata Dasi*(r) where an endowment policy on the life of the husband with wife as the nominee was held to fall within sec. 6 and the case of *Lalithambal v. The Guardian of India Insurance Co. Ltd.* was dissented from. In *Kannayal v. Subbaraya*(s) the words "the policy is for the benefit of the wife" were not found in the policy but it was stated that the amount due on the policy should be paid to the assured, on the expiry of 15 years or to his wife on the death of the assured if earlier. The assured became insolvent and the application was made by the creditor for the assignment of the policy in favour of the Official Assignee and it was held that the policy fell within sec. 6 and there was a trust in favour of the wife from the moment the policy was taken for her benefit, although she would not be entitled to claim anything unless the event happened. The case of *Lalithambal v. Guardian of India Insurance Co. Ltd.*, was considered in this case.

The Bombay High Court has taken a contrary view with regard to the application of the proviso to sec. 6. In *Shankar v. Umabai*(t) the Court held that

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| (m) <i>Krishnan v. Velayee</i> , I.L.R. (1938) Mad. 909. | (q) (1937) Mad. 990. |
| (n) 18 C. W. N. 1335. | (r) (1940) 1 Cal. 64. |
| (o) 32 C. W. N. 634. | (s) (1938) Mad. 867. |
| (p) A. I. R. (1937) M. 645. | (t) 37 Bom. 471. |

as the Married Women's Property Act did not apply to Hindus a policy of insurance effected by a Hindu on his own life but expressed to be for the benefit of his wife did not create a trust for the benefit of his wife and on the death of the assured the policy formed a part of the estate of the deceased. This decision was given in 1913 before the section was amended and was followed by the Calcutta High Court in 1914 in *Eshani Dasi v. Gopal Chandra Dey(u)*. The learned Judges went further in that case and held that a policy of life insurance effected by a Hindu for the benefit of *his wife and children* also was not governed by the provisions of sec. 6, although sec. 2 only provided that the Act did not apply to a *married woman* who was a Hindu or where husband was a Hindu at the time of the marriage. The learned Judges preferred to follow *Shanker v. Umabai* and dissented from the view of the Madras High Court in *Balamba v. Krishnayya*. *Eshani Dasi's* case was followed by the Calcutta High Court in *Krishna Lal v. Pramila Bala(v)*. That decision was given in 1928 after the Married Women's Property Act was amended in 1923.

The Bombay High Court in *Dinbai v. Bamanshaji(w)* held that an endowment policy was not a policy within the meaning of sec. 6 under which policy the sum was payable at death or at the particular age. But that decision is not approved of in *In re Ashalata Dasi(x)* where it was held that an endowment policy on the life of the husband with the wife nominated to receive the amount fell within sec. 6 and a valid trust was created although it was contingent by the special provision in nomination. With respect it is submitted that the decision in *Dinbai v. Bamanshaji* is not correct.

Muhammadans :—Sec. 6 of the Married Women's Property Act was by the Amending Act XIII of 1913 made applicable to Muhammadans in Madras to policies effected after 31st December 1913 and in other parts of India to policies effected after 1st April 1923. But the contingent nature of the trust created a conflict with the principles of Mahomedan law which made a contingent gift void. (See Mulla's Mahomedan Law, 11th Edn., p. 138). In consequence of this difficulty, when the Insurance Act IV of 1938 was passed, in sec. 38 in the following Sub-sec. was added: "(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be in operative or that the interest shall pass to some other person on the happening of a specific event during the lifetime of the person whose life is insured and an assignment in favour of the survivor or survivors of a number of persons, shall be valid". After the passing of the Insurance Act IV of 1938 it was held in *Sadiq Ali v. Zahida Begam(y)* that an assignment of a policy of insurance for life made by a Mahomedan husband in favour of his wife was valid, although there was a proviso in the assignment that in the event of her predeceasing him the assignment would become null and void as under sec. 38(7) of the Insurance Act the assignment was valid notwithstanding any rule of Muhammadan law to the contrary.

The Madras High Court in *Enayatulla v. Jeelanee(z)* held that the amendment of the Married Women's Property Act had not the effect of avoiding all the policies effected before the 31st December 1913 and that sec. 6 applied and a trust was created. The Court further held that a trust created under sec. 6 can be revoked if the performance of the trust becomes impossible or the trust fails or is satisfied or comes to an end in which event the policy money will form part of the estate of the insured. See 78(a) of the Indian Trusts Act provides that a trust can be revoked where all the beneficiaries are competent to contract by

(u) 18 C. W. N. 1355.

(v) 32 C. W. N. 634.

(w) 58 Bom. 513.

(x) (1940) 1 Cal. 64.

(y) (1939) All. 257.

(z) A. I. R. (1942) M. 136.

their consent. Under sec. 58 of the Indian Trusts Act, it is also competent for a beneficiary to transfer his interest and the interest of the beneficiaries, although contingent, can be transferred because the right created under the policies is not in the nature of a mere right to sue. If the beneficiary is capable of transferring his interest he can also release it. If once the trust is put an end to the assured becomes the owner of the policy and of the moneys payable thereunder.

Sec. 6 cl. (2) of the Married Women's Property Act requires that when the sum secured by the policy becomes payable, it shall unless special trustees are appointed to receive the same, be paid to the Official Trustee of the Province. At the time when the Married Women's Property Act was enacted in 1874 the Official Trustee referred to was the Official Trustee appointed under the provisions of sec. 10 of Act XVII of 1864. That Act has been repealed by the Official Trustee Act II of 1913. Sec. 8 of that Act enacts that any person intending to create a trust may with the consent of the *Official Trustees* appoint him to be the trustee of the trust property. What is there to happen if the Official Trustee declines to give the consent? That question arose in *Hari Dasee Debee v. Manufacturers Life Insurance Co. Ltd.*, (a) in which case the plaintiff who was a Hindu widow filed the suit against the insurance company claiming the money under the life policy effected by her husband on his life for the benefit of his wife. The defendants raised this point that the plaintiff was not entitled to sue under sec. 6 of the Married Women's Property Act. Thereupon an application was made for the appointment of special trustees and the application was granted and special trustees were appointed. The defendant company again raised the contention that the order (which was made *ex parte*) was without jurisdiction and the Judge had no power to appoint special trustees and the Official Trustee was the only person to whom the moneys were payable. Thereupon the plaintiff applied to the Official Trustee requesting him to undertake the trust and prosecute the suit. But as no indemnity was offered the Official Trustee declined. It was held that the words "special trustees" used in sec. 6 did not refer only to the trustees appointed by the husband but the words "are duly appointed" would cover an appointment made after the death of the husband and that such an appointment can only be made by the Court and the Court had power to appoint trustees under the Indian Trustees Act.

The view taken in the above case that the Official Trustee mentioned in sec. 6 of the Married Women's Property Act has reference to the Official Trustee constituted by sec. 10 of Act XVII of 1864 and not the Official Trustee constituted by Act II of 1913 did not find favour with Ameer Ali, J. (b).

21. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

Effect of marriage between person domiciled and one not domiciled in British India.

[This is sec. 44 of the Succession Act X of 1865. It does not apply to Hindus, Muhamadans, Buddhists, Sikhs or Jains (see sec. 22 clause 2.)]

This section lays down a special rule when the domicile of husband and wife is different before the marriage. It lays down two conditions before the section

(a) (1937) 2 Cal. 67.

(b) *In re Zebunnessa Khatoon*, (1939) 2 Cal. 526.

becomes applicable : (1) that either of parties must have an Indian domicile and (2) the marriage must take place in British India. If these two conditions are fulfilled the section lays down that by such a marriage neither party acquires by the marriage any right in the property of the other. This section like the previous section relates to the immediate effect of marriage but does not affect the right to succession. It will be seen from sections 15 and 16 of this Act that by marriage a woman acquires the domicile of her husband, and by section 5 succession to moveable property of a person is regulated by the law of his domicile. Therefore, if a woman in India possessing moveable property marries a person of English domicile, the husband will not acquire any right over her property during their joint lives, but if she dies he would become entitled to the whole of her property to the exclusion of her children according to English law(c).

Example

A having an English domicile marries a wife B having an Indian Domicil. B has moveable property of her own. A does not acquire any right over B's property. B dies leaving her husband A, a mother, and a brother. Under the Act the property would be divided as follows :—

Husband $\frac{1}{2}$, mother and brother $\frac{1}{4}$ equally (sec. 43). But succession to the moveable property of a deceased person is regulated by the law of the country of his domicile (sec. 5) and the wife B by marriage acquires her husband's domicile. In this case, therefore, the succession will be according to the English law and under that law the husband will take the whole(d).

Exception.—*Doctrine of Restraint on Anticipation.*—This section applies to all the property of the parties save and except the property settled by an anti-nuptial deed of Marriage Settlement. In England it is common for the parents of the bride and bridegroom to have marriage settlements executed settling some property for the benefit of the husband and wife and their issue. Such deeds usually contain a clause whereby the husband and wife enjoy the property settled for their separate use respectively without power to sell or charge the corpus of the property. This is known as the principle of “Restraint on Anticipation.” It means restraint on alienation and is an exception established by equity in favour of married women to the general rule of law which regards conditions in transfers of property restraining alienations as null and void. Neither the Succession Act nor the Indian Married Women's Property Act has abrogated this equitable principle, though at one time it was doubted(d). The case of *Hippolite v. Stuart* decided that sec. 8 of the Married Women's Property Act extended to the separate property of a married woman which was subject to restraint upon anticipation. It gave the creditor of the married woman the right to attach her separate property, notwithstanding the restraint. But the case was dissented from in *Re Mantel and Mantel*(e), and Farran J., in *Cursetjee P. Tarachand v. Rustomjee*(f) declined to follow this decision and he held that the object of passing these Acts was to assimilate the position of a married woman to that of an unmarried one so far as regards her dealings with her own property. This doctrine has been given statutory effect by section 10 of the Transfer of Property Act, which runs as follows :—“Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : *Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.*” Also by sec. 2 of the Transfer of Property (Amendment) Act XXI of 1929 for the proviso

(c) *Miller v. Adm.-General*, 1 Cal. 412; *Hill v. Adm.-General*, 23 Cal. 506. (e) 18 Mad. 19.
(d) *Hippolite v. Stuart*, 12 Cal. 522. (f) 11 Bom. 348.

to sec. 8 of the Married Women's Property Act, 1874, the following proviso has been substituted: "Provided that nothing herein contained shall—(a) entitle such person to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage, to transfer or charge the same or her beneficial interest therein." By sub-sec. (1) of sec. 8 the separate property of a married woman became automatically bound for the payment of her liabilities whether she had any property at the date of the contract or not. The proviso saved the effect of restraint. Since the said amendment the Calcutta High Court has not followed, *Hippolite v. Stuart* in *In re Trust of George Bridge(g)* where under the will of George certain shares were settled for the benefit of his unmarried daughter "during her life for her separate use without power of anticipation." The daughter married and incurred debts and her creditor filed a suit in which by consent decree receiver was appointed of the moneys payable to the daughter under her father's will. The Official Trustee declined to pay to the receiver and it was held that the receiver was not entitled to the moneys. It was further held in this case that before a creditor can obtain a decree against a married woman on her contract, much more has to be done than a mere proof of the contract and breach, and the decree when obtained will not be an ordinary money decree. It must be in the form laid down in (1887) 20 Q.B.D. 120. It is only in case of a *married woman* that the law makes this exception. Therefore, if a woman is unmarried at the date of the contract the law ordains that she cannot possess property subject to such condition(h). Accordingly in *Goudoin v. Venkatesa(i)* it was held that the income of property belonging to a married woman subject to a restraint on anticipation accruing due after the date of the decree against a married woman's separate property was not liable to attachment.

Hindus.—Sec. 21 does not apply to the succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina (see sec. 22 (2)). The provisions of the secs. 4, 5, 6, 7, 8 and 9 of the Married Women's Property Act also do not apply to Hindus(j).

22. (1) The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India, with the approbation of the High Court.

(2) Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

[Clause (1) is sec. 45 and clause (2) is sec. 331 of the Succession Act X of 1865. It does not apply to Hindus, Mahomedans, Buddhists, Sikhs and Jains.]

Sub-sec. (1)

This is an enabling section and is based on the Infant's Settlement Act, 1855 (18 & 19 Vict. c. 48). A minor is incapable of dealing with his property. A

(g) (1938) 2 Cal. 233; A. I. R. (1938) C. 486;

42 C. W. N. 577.

(h) *Cursetjee P. Tarachand v. Rustumjee*, 11 Bom. 348.

(i) 30 Mad. 378.

(j) *Balamba v. Krishnayya*, 37 Mad. 483; *Shankar v. Umabai*, 15 Bom. L. R. 320.

minor cannot make a will. This section enables a minor's property to be settled on trust in the following case :

(a) If the settlement is in contemplation of marriage, and

(b) If the settlement is made with the approbation of the minor's father or if he is dead or absent from British India with the approbation of the High Court. Both the conditions must be fulfilled.

Sub-sec. (2)

This sub-section applies to Parsis. As section 20 does not apply to any marriage contracted before the first day of January, 1866, this sub-sec. further enacts that sections 21 and 22 shall not apply to any will made or intestacy occurring before the first day of January, 1866. The effect of these enactments is to leave the law applicable to persons other than Hindus, Muhammadans, Buddhists, Sikhs and Jains before 1st January, 1866, entirely unchanged.

PART IV.

Of Consanguinity.

23. Nothing in this Part shall apply to any will made or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

Application of
Part.

[This is sec. 331 of the Succession Act X of 1865, and sec. 8 of the Parsi Intestate Succession Act XXI of 1865.]

The whole of this Part applies to Europeans, East Indians, Eurasians, Jews and Armenians(a), Indian Christians and other persons professing the Christian religion domiciled in British India.

This part applies to all the Europeans in India not having an Indian domicile so far as it relates to succession to moveable property. But if a person domiciled in England dies in India leaving a will and possessed of moveable property in India, the Courts in India will not grant probate unless the will is executed according to English law(b).

24. Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

[This is sec. 20 of the Succession Act X of 1865.]

The relationship contemplated by this and the subsequent sections is the relationship flowing from lawful wedlock(c).

The definition of the word "kindred" or "consanguinity" is taken from Blackstone's commentaries. Consanguinity is of two kinds—(1) lineal (sec. 25) and (2) collateral (sec. 26). The expression "next of kin" also means the same thing. It means the nearest blood-relations of the propositus in an ascending and descending line(d). Although a widow is entitled to a share in case of the intestacy of her husband, she is not his next of kin(e). A mother-in-law, or step mother is not a next of kin(f). To constitute a next of kin there must be blood-relationship between him and the intestate.

25. (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(a) *Solomon v. Ezra*, 1 Boulnois 234, *In re Sarah Ezra*, 58 Cal. 761.

(b) *Stanley v. Barnes*, 3 Hagg. 373.

(c) *Smith v. Massey*, 30 Bom., 500, 8 Bom. L. R. 322.

(d) *Halton v. Foster*, L. R. 3 Ch. 505; *Harris v. Newton*, 46 L. J. Ch. 268.

(e) *Watt v. Watt*, 3 Ves. 244.

(f) *Rutland v. Rutland*, 2 P. W. 209 at p. 215.

(3) A person's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third degree, and so on.

[This is sec. 21 of the Succession Act X of 1865.]

26. (1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

Collateral consanguinity.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending.

[This is sec. 22 of the Succession Act X of 1865.]

Classification.—These two sections classify consanguinity—lineal and collateral. Lineal consanguinity is when two persons are connected in one straight line whether descending or ascending drawn from the propositus. Collateral consanguinity is when two persons are connected by a descending line which is not a straight line. Under these definitions of relationship husband and wife will not come for they bear neither lineal consanguinity nor collateral consanguinity(g).

Mode of calculating Degrees.—In case of lineal consanguinity every generation counts a degree ascending or descending. In case of collateral consanguinity the rule is to count upwards from the person deceased to the common stock and then downwards to the collateral relative, reckoning a degree for each person both ascending and descending; or, in other words to take the sum of the degrees in both lines to the common ancestor. It must be noted that in counting the degrees the propositus is to be excluded, e.g., a man's son or father is related to him in the first degree, a man's first cousin in the fourth degree. (See Schedule I referred to in section 28 Table of Consanguinity.

Persons held for purpose of succession to be similarly related to deceased.

27. For the purpose of succession, there is no distinction—

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

(b) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(c) between those who are actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

[This is sec. 23 of the Succession Act X of 1865.]

Clause (a)

Relations by the father's side and the mother's side are in equal degree of kindred ; and therefore equally entitled to succeed.

Clause (b)

This clause abolishes the distinction between full blood and half blood.

Example.

A, a widow, has a daughter B by her first husband. A marries again and by her second husband she has two sons C and D. B dies intestate and unmarried leaving property. The property will be divided equally between A, C and D(h).

Clause (c)

According to this clause children *en venter sa mere* are deemed to be in existence at the time of the father's death.

Mode of computing degrees of kindred.

28. Degrees of kindred are computed in the manner set forth in the table of kindred set out in Schedule I.

Illustrations

(i) The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree ; there being one degree of ascent to the father, and another to the common ancestor, the grandfather ; and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

(ii) A grandson of the brother and a son of the uncle, *i.e.*, a great-nephew and a cousin-german, are in equal degree, being each four degrees removed.

(iii) A grandson of a cousin-german is in the same degree as the grandson of a great uncle, for they are both in the sixth degree of kindred.

[This is sec. 24 clause (1) of the Succession Act X of 1865, the illustrations are clauses 2, 3 and 4 of that section.]

First Cousin or Cousin-German.—The word cousin or first cousin means primarily children of uncles and aunts. The propositus and his first cousin are related in the fourth degree, following the rule of computing from the propositus ascending to his father one degree ; then to the common ancestor, the grandfather, two ; then, descending from the grandfather to the uncle, three ; and from the uncle to the child of the uncle, first cousin, four.

Second Cousin.—The word second cousin means a person who has the same great-grandfather or great-grandmother and is related to the sixth degree, thus, from the propositus ascending to his father, one ; from his father to his grandfather, two ; from his grandfather to his great-grandfather (the common ancestor), three ; then descending from the great-grandfather to the great-uncle, four ; from the great-uncle to the great-uncle's son, five ; from his great-uncle's son to his second cousin, six.

A first cousin twice removed is in the same degree as a second cousin ; for they are both in the sixth degree of consanguinity (see Schedule I). But a first cousin once removed takes precedence over a second cousin.

PART V.

Intestate Succession.

CHAPTER I.

Preliminary.

29. (1) This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India in all cases of intestacy.

[This is sec. 2 and 331 of the Succession Act X of 1865.]

Sub-sec. (1)

Part V, Chapters, I, II and III lay down the rules of succession to the property of a person dying intestate. Chapter I lays down that Part V shall constitute the law of British India in all cases of intestacy. Chapter II lays down the rules of succession in cases of intestates other than Parsis and Chapter III lays down the rules of succession for Parsi intestates.

The whole of this Part applies to Europeans, Indian Christians, Jews, Armenians and other persons professing Christian religion domiciled in British India. Chapter I applies to Parsis.

This sub-section again leaves the law applicable to Europeans, Indian Christians and Parsis before the first day of January, 1866, untouched; such law was the Common Law of England except as modified by any customary law applicable to the Parsis or the Indian Christian community.

Sub-sec. (2)

Extent of the Act.—This Act extends to the whole of British India and Zanzibar:—As regards Zanzibar by clause II of the Zanzibar Order in council dated 7th July 1897 the Indian Succession Act, 1865, except sec. 331 was made applicable to Zanzibar. By clause 29 of the same Order, Zanzibar was to be deemed a district of the Presidency of Bombay for the purposes of this Act(a). This sub-sec. is section 2 of the Indian Succession Act of 1865. It applies to Parsis as the provisions of the Parsi Intestate Succession Act (XXI of 1865) are incorporated in Chapter III of this Part and the Parsi Intestate Succession Act is repealed. (See Schedule IX).

30. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

As to what property deceased considered to have died intestate.

Illustrations

(i) A has left no will. He has died intestate in respect of the whole of his property.

(ii) A has left a will, whereby he has appointed B his executor; but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(a) *MacLeod v. Consul General of Zanzibar*, 8 Bom. L. R. 725.

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

[This is sec. 25 of the Succession Act X of 1865.]

What is intestacy.—A man is considered to die intestate in respect of all property of which—

(1) He has not made a testamentary disposition, *e.g.*, when he has left no will.

(2) He has made a will but the will is not capable of taking effect, *e.g.*, when he has bequeathed his whole property for an illegal purpose or if the subject of the bequest is non-existing, (see ill. iv).

Intestacy is of two kinds—total intestacy or partial intestacy. A man may die partly testate and partly intestate, *e.g.*, where the will contains several bequests to several legatees, but there is no disposition of the residue; he dies intestate as regards the residue(b).

The word “intestate” is defined in section 55 of the Administration of Estates Act (15 Geo. 5. c. 23) as follows:—“Intestate” includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.

Illustration (ii).—*Executor's Right to Residue*:—In England before the Executor's Act, 1830, (Will IV., ch. 40) if a testator by his will appointed an executor but did not dispose of the residue, the executor took the residue absolutely, unless by implication or presumption he appeared to be a trustee only. This was abolished by the Executor's Act, 1830, and the executor is merely a trustee of any residue not expressly disposed of by the will for the persons entitled under the Statute of Distribution.

According to illustration (ii) of this section the executor takes no beneficial interest in the property of the testator which he has not disposed of by his will.

Example

A testator executed his will on a printed form and in the column for appointment of executor he filled up the name of his wife and directed her to pay his debts and funeral and testamentary expenses. The clause for disposition of the property was kept blank thus, “I give and bequeath unto—”. It was contended that the widow was entitled to take the property. *Held*, that the widow took the property as a trustee for persons entitled as on intestacy including herself(c).

CHAPTER II

Rules in cases of Intestates other than Parsis.

Chapter not to apply to Parsis. **31.** Nothing in this Chapter shall apply to Parsis.

[This is sec. 8 of the Parsi Intestate Succession Act XXI of 1865.]

This chapter applies to Europeans and Indian Christians only and lays down the shares of the next of kin of the deceased in cases of intestacy.

For rules relating to Parsis see Ch. III.

(b) *Erasha v Jerbai*, 4 Bom 587.

(c) *In re Skeats, Thain v. Gibbs*. (1936) 1 Ch. 683.

32. The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

Explanation.—A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

[This is sec. 26 of the Succession Act X of 1865.]

Explanation.—It is based on the doctrine of English law whereby the widow's right under the Statute of Distribution to participate in the personal property of her husband may be validly barred by a settlement executed before marriage. The *Explanation* gives statutory effect to the same principle. The settlement must be ante-nuptial and not post-nuptial.

Where intestate has left widow and lineal descendants, or widow and kindred only or widow and no kindred.

33. Where the intestate has left a widow—

(a) If he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained ;

(b) *Save as provided by section 33A* if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained ;

(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

[This is sec. 27 of the Succession Act X of 1865. In sub-sec. (b) the words in italics are added by s. 2 Act 40 of 1926.]

Share of the Widow.—This section declares the share of the widow in her husband's estate on the husband dying intestate.

(a) $\frac{1}{3}$ if the husband has left lineal descendants.

(b) $\frac{1}{2}$ + Rs. 5000/- if there are no lineal descendants but there are collateral relations of the husband and the net value of the property exceeds Rs. 5000 (sec. 33A).

(c) Whole (i) if the husband has left no kindred to him.

(ii) if the nett value of the whole property is less than Rs. 5000/- (sec. 33A.)

If a Hindu becomes a convert to Christianity and dies leaving a Christian widow and a Hindu brother and sister the distribution will be according to this Act and the widow will take half and the brother and sister will take half equally(d). But if a Hindu marries a Hindu girl and then becomes a Christian whereupon the Hindu

wife refuses to live with him and renounces all claims to his estate, she is not entitled to her share as a widow(e).

Special provision
where intestate has
left widow and no
lineal descendants.

33A. (1) Where the intestate has left a widow but no lineal descendants and the nett value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

(2) Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 33 as if it were the whole of such intestate's property.

(4) The nett value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply—

(a) to the property of :—

- (i) any Indian Christian,
- (ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or
- (iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under section 24 of the Special Marriage Act, 1872, regulated by the provisions of this Act ;

(b) unless the deceased dies intestate in respect of all his property.

This section was inserted by Act XL of 1926 in order to make a better provision for the widow when the estate is small. It is based on Statute 53 & 54 Vict. c. 29. This section will become applicable under the following circumstances:—

(1) Where the husband has died intestate in respect of all his property (sub-clause 5(b)). If the husband dies leaving a will but the will is not capable of taking

effect as to a portion of his estate, this section will not apply. But if the will is not capable of taking effect as to the whole of his property the section will apply.

(2) Where the nett value of the property does not exceed five thousand rupees. If it exceeds five thousand rupees the widow gets Rs. 5,000 first + one-half share in the residue.

(3) Where the husband has left no lineal descendants.

Sub-sec. (4)

Ascertainment of Nett Value.—The property mentioned in this sub-section is both moveable and immoveable property. In England in the case of fee simple the net value is calculated at 20 years purchase of the annual value at the date of the death of the intestate as determined by the law of the property tax. It is the gross value of the estate minus the following: (a) debts left by the intestate, (b) his funeral expenses, (c) administration expenses *e.g.*, payment of duty and expenses of petition and costs of an administration suit (if any), and (d) all other lawful liabilities and charges.

Sub-sec. (5) (a).

Indian Christians are excluded from the benefit of this section. To them sec. 33 will apply.

Sub-sec. (5) (b).

This sub-sec. is in accordance with the English Act. The provision of this section will apply only when there is total intestacy and not partial intestacy, (see Preamble to the Amending Act 40 of 1926). It will apply when there is a complete failure by lapse of all beneficial interests under a will (f). If the husband has left a will not making a sufficient provision or any provision for the widow there is an indication that he does not want her to benefit and this section will not help the widow in such a case. The Legislature has only provided when the person has died intestate in respect of all his property. This sub-sec. is an independent sub-sec. and is not part of sub-sec. 5(a). Sec. 38A does not apply to an Indian Christian and to the persons specified in sub-sec. (5) (a) (ii) and (iii) even if they died intestate in respect of all their property (g).

34. Where the intestate has left no widow, his property

Where intestate has left no widow, and where he has left no kindred.

shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it

shall go to the Crown.

[This is sec. 28 of the Succession Act X of 1865.]

Share of Lineal Descendants.—Sections 37 to 40 lay down the shares of the lineal descendants and the share is worked out as follows:—If there is a widow she takes $\frac{1}{3}$ and $\frac{2}{3}$ goes to lineal descendants. If there is no widow the property goes to the lineal descendants as laid down in sections 37 to 40. If there are no lineal descendants, the property goes to those who are kindred to the deceased in the proportions laid down in sections 41 to 48. The word “kindred” is defined in section 24. But the word kindred used in this section excludes the lineal descendants, *i.e.*, “not being lineal descendants.”

Share of the Crown.—The Crown takes the whole only if there is no widow, nor lineal descendants nor kindred. At one time if an illegitimate person died

(f) *Re. Cuffe* (1908), 2 Ch. 500.

(g) *Arulayi v. Antonimuthu*, A. I. R. 1945 M. 47.

leaving no wife or children, the Crown took the whole property as *bona vacantia* but it was customary for the Crown to regrant the property to the persons who, if the deceased had been legitimate would have been entitled to it as next-of-kin. A notification was issued under the Act of 1865 which is published in the Gazette of India, 5th April 1873, Part IV., at p. 334 giving effect to the practice of regranting the property stated above. If the Crown takes the property by escheat, this Act does not apply to the Crown(h).

35. A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

Rights of
widower.

[This is sec. 43 of the Succession Act X of 1865.]

Share of the Husband.—

(a) $\frac{1}{3}$ if there are lineal descendants, (sec. 33).

(b) $\frac{1}{2}$ + Rs. 5,000 if there are no lineal descendants but collaterals and the nett value of the estate exceeds Rs. 5,000 (sec. 33A). The additional sum of Rs. 5,000 under section 33A is mentioned as the share of the widow under sec. 33A but under this section the husband has got the same right, (see Statement of Objects and Reasons, Gazette of India, (1926), Part V p. 114).

(c) Whole (i) if there are no kindred of the wife,

(ii) if the nett value of the estate is less than Rs. 5,000.

(iii) If the wife dies leaving no lineal descendants or next-of-kin, the husband is entitled to the whole (sec. 33c)(i).

Judicial separation.—If an order under the Indian Divorce Act IV of 1869 is passed for the judicial separation and the wife dies whilst the separation continues, the wife is from the date of the order considered to be an unmarried woman with respect to her property and in case she dies intestate her property becomes distributable as an unmarried woman as if her husband was dead, (see sec. 24 Indian Divorce Act).

Distribution where there are lineal descendants.

36. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

Rules of distribu-
tion.

[This is sec. 29 of the Succession Act X of 1865.]

The rules of distribution of the property of an intestate are laid down in sections 37 to 40 when there are lineal descendants and in sections 41 to 48 when there are no lineal descendants and the order of distribution is as follows : —

- (1) To deduct first the share of the husband or wife as the case may be.
- (2) If there are lineal descendants to distribute the residue (or the whole if there is no husband or wife) amongst the lineal descendants in the shares and proportions laid down in sections 37 to 40.
- (3) If there are no lineal descendants then only to distribute the residue (or the whole if there is no husband or wife) amongst the kindred of the intestate in the shares and proportions laid down in sections 42 to 48.

(h) *Secretary of State v. Girdhari Lal*, 54 All. 226. (i) *Ganta Daniyelu v. Gunthi Yesu*, A. I. R. (1925) M. 1110.

37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

Where intestate has left child or children only.

[This is sec. 30 of the Succession Act X of 1865.]

Share of Children.—Where the intestate has left a widow and child, the widow gets one-third and the child gets two-thirds. If there is no widow the child gets whole. If there are more than one child, viz., sons and daughters only, i.e., lineal descendants of the first degree, they take equally whether male or female. A posthumous child has the same right as if it was actually born at the date of the death of the intestate, (see illustration (iv) sec. 40).

An adopted child is not a child within the meaning of this section(j).

Illegitimate Child.—The word “child” used in this section does not include an illegitimate child(k).

38. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grandchildren.

Where intestate has left no child, but grandchild or grandchildren.

Illustrations

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

[This is sec. 31 of the Succession Act X of 1865. Illustration (c) of that section is omitted and is transposed to sec. 40, illustration (iv).]

Share of Grandchildren.—When there are grandsons and grand daughters only, i.e., all lineal descendants of the second degree, they take equally. That was the state of the law in England when the Act of 1865 was passed. But according to the decision in *Ross's Trust*(l) it has been decided that such descendants take not per capita but per stirpes, (Williams on Executors 12th Eln. p. 1024).

39. In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

Where intestate has left only great-grandchildren or remoter lineal descendants.

[This is sec. 32 of the Succession Act X of 1865.]

(j) *Ma Khin v. Ma Ahma*, 12 Rang. 184.

A. I. R. (1931) C. 560.

(k) In the *Goods of Sarah Ezra*, 58 Cal. 761; (l) L. R. 13 Eq. 286.

Share of Great-grandchildren.—When there are great-grandchildren or other remote lineal descendants all in the same degree only, they share equally both males and females.

40. (1) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations

(i) A had three children, John, Mary and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(ii) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great-grandchildren.

(iii) A has three children, John, Mary and Henry; John dies leaving four children; and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry, one-third to Mary's child, and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

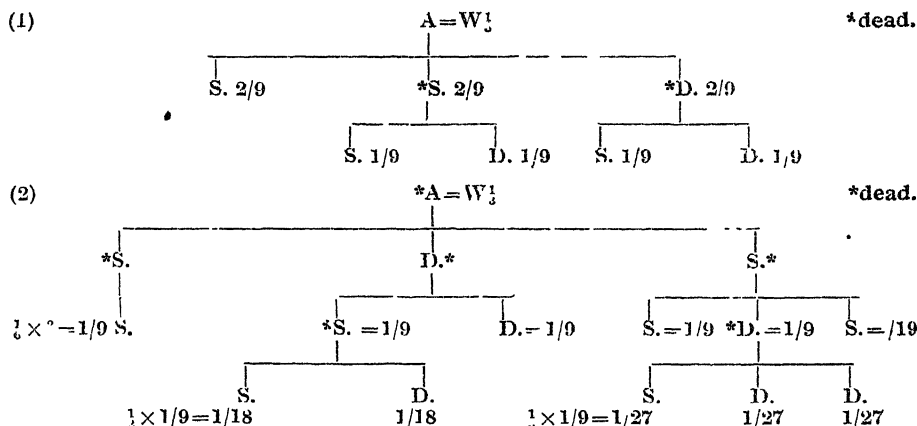
(iv) A has two children, and no more, John and Mary. John dies before his father, leaving his wife pregnant. Then A dies leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and the posthumous child.

[This is sec. 33 of the *Succession Act X of 1865*, illustration (iv) is illustration (c) of sec. 31 of that Act.]

Share of children, grandchildren and great-grandchildren and other lineal descendants, (i.e., lineal descendants who do not all stand in the same degree of kindred).

Equally, *per stirpes*, i.e., grandchildren and great-grandchildren take equally between them their deceased parent's share.

Examples



Note. In example (1) A is the propositus. A dies leaving widow W, one son S and four grandchildren S and D and S and D. Widow takes $\frac{1}{3}$ and the $\frac{2}{3}$ will be divided into three shares $\frac{2}{9}$, $\frac{2}{9}$ and $\frac{2}{9}$ and the share of the pre-deceased son and daughter will be equally divided between their children $\frac{1}{9}$ and $\frac{1}{9}$.

In example (2) all the children of the propositus are dead but he leaves a widow, four grandchildren and five great-grandchildren. The widow will take the one-third and the two-thirds will be divided into six parts as there are six grandchildren (four living and two dead), each grandchild taking one-ninth; the respective shares of the deceased grandchildren will go to their children equally. Observe, that in this case the *stirpes* or root is the grandchildren and not the children as all the children are dead. If any child of A were living, the root would be the children. (See illustration (iv) sec. 40.)

The rule in England seems to be different. See in *Re Ross' Trusts*(m), where the share is calculated according to the number of *children* and not with reference to the number of grandchildren as in the above case.

It may also be noted here that in construing the will where the testator desires his property to be divided amongst his children and their lineal descendants that the general rule is to take children as the stock and make division accordingly. In *Sidey v. Perpetual Trustees Estate Co. Ltd.*(n) the will contained the following clause "from and after the death of the last survivor of my four children I give devise and bequeath the whole of my residuary estate to and amongst my then surviving descendants in such manner that the same shall be divisible per stirpes among the children, grandchildren and remoter issue of such of my children as shall have left issue." The testator left four children one of whom died without issue. It was held that the children of the testator formed the stocks of descent and the estate became divisible into three equal parts one of which should go per stirpes to the issue of each of the testator's three children who left issue.

Distribution where there are no lineal descendants.

Rules of distribution where intestate has left no lineal descendants.

41. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

[This is sec. 34 of the Succession Act X of 1865.]

Sections 42 to 48 lay down the rules of distribution of the property of an intestate where the intestate has died without leaving children or remoter lineal descendants and the rules of distribution are as under in order of priority.

(1)	Widow $\frac{1}{2}$	and	Father $\frac{1}{2}$	(sec. 42).
(2)	Widow $\frac{1}{2}$	and	Mother, Brothers and Sisters $\frac{1}{2}$ equally	(sec. 43).
(3)	Widow $\frac{1}{2}$	and	Mother, Brothers, Sisters, and Children of any deceased Brother or Sister. $\frac{1}{2}$ equally <i>per stirpes</i> .	(sec. 44).
(4)	Widow $\frac{1}{2}$	and	Mother and Children of Brothers and Sisters. $\frac{1}{2}$ equally <i>per stirpes</i> .	(sec. 45)
(5)	Widow $\frac{1}{2}$	and	Mother $\frac{1}{2}$	(sec. 46)
(6)	Widow $\frac{1}{2}$	and	Brothers and Sisters and Children of predeceased Brothers and Sisters. $\frac{1}{2}$ equally <i>per stirpes</i> .	(sec. 47)
(7)	Widow $\frac{1}{2}$	and	Remote kindred $\frac{1}{2}$ (in the nearest degree).	(sec. 48)

Where intestate's
father living.

42. If the intestate's father is living, he shall succeed to the property.

[*This is sec. 35 of the Succession Act X of 1865.*]

Father's Share—

- (1) $\frac{1}{2}$ when the intestate leaves a widow.
- (2) Whole when the intestate has left no widow.

Note.—Father excludes any other kindred(o). Although a father and a son of the intestate stand in the first degree of kindred the father is excluded when there is a son or remoter lineal descendant.

Under this section a Hindu father can succeed to the property of his son convert to Christianity(p).

43. If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Where intestate's
father dead but his
mother, brothers
and sisters living.

Illustration

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of this mother, but not of his father. The mother takes one-fourth, each brother takes one-fourth, and Mary, the sister of half blood, takes one-fourth.

[*This is sec. 36 of Succession the Act X of 1865.*]

Mother's Share.—Mother shares after the father if there are no lineal descendants. Not so amongst the Parsis. Amongst Parsis the mother shares with the

(o) *Administration General v. Anandachari*
9 Mad. 466.

(p) *Ibid.*

father equally (sec. 55). The share of the mother is ascertained as follows. Widow's half share is to be deducted first if there is a widow of the intestate. The other half is then divided amongst the mother and brothers and sisters *per capita* equally when there are brothers and sisters only. The brothers and sisters of the intestate whether of full blood or of half blood are equally entitled, (see illustration). If there are no brothers or sisters or the children of brothers or sisters, the mother takes the whole (sec. 46).

Note.—A grandfather and a grandmother of the intestate, although they are in the second degree of kindred like the brothers and sisters, are excluded from the distribution, so long as the brothers and sisters are the sharers.

Examples.

(1) _Widow,	one brother,	two children of a deceased sister,	grandfather
$\frac{1}{2}$	$\frac{1}{4}$	$\frac{1}{4}$ (equally)	(takes nothing)
(2) Widow,	brother's grandson,		grandfather,
$\frac{1}{2}$	(takes nothing, grandfather is of nearer degree).		$\frac{1}{2}$

Step Mother.—A step mother is not a kindred of the intestate and the word “mother” does not include a step mother(*q*). (Halsbury Vol. 10, p. 608).

44. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.

Illustration

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each takes one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

[This is sec. 37 of the Succession Act X of 1865.]

Mother, Brother or Sister and a child or children of any predeceased brother or sister share equally *per stirpes*.

Note.—The representation is to be carried upto the children of brothers and sisters and not beyond. If there are no children of brothers and sisters the rule is to count the number of degree of relationship.

45. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares,

Where intestate's father dead and his mother and children of any deceased brother or sister living.

such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

[This is sec. 38 of the Succession Act X of 1865.]

If there are no lineal descendants, nor father nor brothers nor sisters but mother and children of brothers and sisters (whether of full blood or half blood) the division is equal, *i.e.*, one share goes to mother and one share to each brother and sister who have predeceased the intestate leaving a child or children him or her surviving.

Example

Mother $\frac{1}{3}$	Brother's son $\frac{1}{3}$	Sister's son $\frac{1}{3}$	Grandfather (takes nothing).
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Where intestate's father dead, but his mother living and no brother, sister, nephew or niece.

46. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

[This is sec. 39 of the Succession Act X of 1865.]

If there are neither lineal descendants, nor father, nor brothers, nor sisters, nor children of brother's or sister's of the intestate, then, subject to the right of the widow, if any, the mother takes the whole.

Examples

- | | | |
|-----------------------------|---|--------------------------|
| (1) Widow,
$\frac{1}{2}$ | Brother's grandson,
(takes nothing, the representation is not to be carried beyond brother's and sister's children). | Mother.
$\frac{1}{2}$ |
| (2) Mother,
whole, | Grandfather, Grandmother,
(takes nothing). | |

47. Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

[This is sec. 40 of the Succession Act X of 1865.]

If there are neither lineal descendants, nor parents, but a grandparent and brothers or sisters and a child or children of any predeceased brother or sister, the brothers or sisters take the whole in priority to the grandparent, the child or children of any predeceased brother or sister taking equally the share of their respective parents.

48. Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.

Illustrations

(i) A, the intestate, has left a grandfather, and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(ii) A, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(iii) A, the intestate, left a great-grandfather, and uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(iv) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree or kindred to him. They will each take one-eleventh of the property.

(This is sec. 41 of the Succession Act X of 1865.)

The representation is to be carried up to the brothers and sisters and not beyond. If there are neither lineal descendants, nor parent, nor brother, nor sister, then, subject to the right of the widow, the estate goes to the next-of-kin who are in the nearest degree of kindred. The degree is ascertained by computing up from the intestate to the common ancestor and then down to the claimant, all the next-of-kin of equal degree sharing equally *inter se*. It should also be noted that although when there are brothers or sisters of the intestate and the children of any deceased brother or sister, such children take *per stirpes* and not *per capita*, still when there are no brothers or sisters but only children of brothers or sisters, such children take *per capita* and not *per stirpes* [see illustration (iv)].

Examples

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|-----|-------------------------------------|-------------------------------------|-------------------------------|---|
| (1) | Widow,
$\frac{1}{2}$ | grandfather,
$\frac{1}{4}$ | grandmother,
$\frac{1}{4}$ | uncle.
(takes nothing, being of third degree). |
| (2) | Great-grandfather,
$\frac{1}{3}$ | uncle,
$\frac{1}{3}$ | nephew.
$\frac{1}{3}$ | (All are of the third degree). |
| (3) | Widow,
$\frac{1}{2}$ | great-grandfather,
$\frac{1}{4}$ | uncle.
$\frac{1}{4}$ | |

Great-grandfather and uncle both share as they are of the third degree.

49. Where a distributive share in the property of a person

Children's advancements not brought into hotchpot.

who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

(This is sec. 42 of the Succession Act X of 1865.)

This section abolished the English rule as to children's advancement being brought into hotchpot in cases of absolute intestacy. According to the English law in cases of total intestacy anything which a child receives from the father in his lifetime should be deducted from his share of his father's estate.

Sec. 42 is a complete repeal of the English doctrine of advancement(r). According to the English Statute of Distribution in case of intestacy, if a child has received payments by way of advances, he must bring that amount into hotchpot before he can get his distributive share in the estate. Here by sec. 42 a child is not required to do so; he can retain the benefits as well as claim a share in the estate.

Even in the case of wife the doctrine of advancement does not apply in India. There is no presumption of advancement. Lord Atkinson in *Kerwick v. Kerwick(s)* observes that under the general law of India there is no presumption of an intended advancement as there is in England in case of purchase of immoveable property where the husband or father pays the money and the purchase is taken in the name of a wife or child. In *Kerwick v. Kerwick(t)*, their Lordships of the Privy Council observed that where a transaction takes place between two persons born in India of British family who have resided practically all their lives in India, the English practice of the Chancery Court of advancement should be applied with great caution. In that case a property was purchased by an Englishman residing in India *benami* in the name of his wife and the wife claimed it as an advancement. It was proved that the husband was aware of the practice prevailing in India of *benami* purchases and the wife's claim was negated. In *Paul v. Nathaniel(u)*, a husband made a fixed deposit of money in a bank in the joint names of himself and his wife repayable to himself or his wife or survivor and it was held that there was no gift to the wife. If the deposit receipt was given to the wife, that would have been a proof of gift. The Privy Council in *Guran Ditta v. Ram Ditta(v)*, and in *Sambhu Nath v. Pushkar Nath(w)* held that in India there is no presumption of advancement in favour of a wife. In these cases a Hindu deposited moneys in bank in the joint names of himself and his wife payable to either or survivor. It was pointed out by their Lordships that the general principle of equity applicable in England and in India was that in the case of a voluntary conveyance without any declaration of trust, there is a resulting trust in favour of the grantor. There is an exception to this rule in English law and a gift to wife is presumed where money belonging to the husband is deposited at a bank in the name of the wife or where a deposit is made in the joint names of both husband and wife. But this exception has not been admitted in Indian law and there is no presumption of an intended advancement. This case was followed in *Keshavlal v. Bai Dahi(x)*.

Advancement and portion.—Advancement is a provision made by the father in his lifetime for the benefit of his child. It is made by a document *inter vivos* usually by a deed of settlement. A portion is a part of the person's estate which is given or left to a child or person to whom another stands *loco parentis*, on marriage or for the purpose of establishing him in business. (See Halsbury's Laws of England, Vol. 13, p. 130, Hailsham Edition p. 165). Mere casual payments or payments to relieve a child from temporary difficulty is not an advancement; but sums given to start a child in life or to make a provision for him constitutes advancement (Halsbury's Laws of England, Vol. 11, pp. 20-21.)

The distinction between the terms "portion" and "advancement" is that a portion is advancement for a particular purpose, whereas advancement is for the general benefit of the child and further that advancement is made by the father only, whereas portion is made by any person standing *loco parentis* to a child. See

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| (r) <i>Siddiqi v. Abdul Jabbar</i> , (1942) All. 478. | (v) 55 I. A. 235. |
| (s) 23 Bom. L. R. 730, P. C. | (w) 47 Bom. L. R. 595 A. I. R. (1945) P. C. 10. |
| (t) 23 Bom. L. R. 730, 47 I. A. 275. | (x) 44 Bom. L. R. 839. See also <i>Panton v. Administrator General</i> 28 Bom. L. R. 11. |
| (u) 53 All. 638. | |

also section 178 which provides that where a parent is under an obligation by contract to provide a portion for a child and fails to do so but bequeaths a legacy to the child, the child is entitled to the legacy as well as the portion. See also sec. 39 of the Transfer of Property Act.

Parsis.—This section does not apply to Parsis. But though it does not apply to Parsis it was held in *Dhunjibhai v. Navazbai*(y), that in excluding by sec. 8 of the Parsi Intestate Succession Act of 1865 from application to Parsis sec. 42 (present sec. 49) which repeals the English rule of advancement it was not intended by Legislature to preserve the said rule for the Parsi community.

Indian Christians.—This section does not apply to Indian Christians(z).

CHAPTER III

Introduction

History of Parsi Law

Prior to 1837 the law applicable to the Parsis and their property was the English Common Law subject to certain exceptions as to marriage and bigamy. In 1835 a Parsi died intestate leaving considerable immoveable property in Bombay and his eldest son filed a suit in the Supreme Court of Bombay for a declaration that he was entitled to the whole of the immoveable property of his father by virtue of the law of primogeniture that prevailed in England. Alarmed at this claim the Parsis of the Bombay Presidency appealed to the Legislature and the result of that appeal was the Parsee Chattels Real Act IX of 1837, whereby it was declared that as from 1st June 1837 all immoveable property situate within the jurisdiction of any of the Courts established by His Majesty's Charter, shall, as far as regards the transmission of such property on the death and intestacy of any Parsee having a beneficial interest in the same, or by virtue of the last will of any such Parsee be taken to be and to have been of the nature of chattels real and not of freehold. The result of the Act IX of 1837 was that it relieved the Parsis of Bombay from the operation of the English law of primogeniture as regards immoveable property but made them subject in all cases of intestacy, as regards every description of property to the English Statute of Distribution by which a third went to the widow and the residue to be divided equally amongst the children and their descendants.

In November 1838 a little more than a year after the Act came into operation the Parsis forwarded to the Legislative Council a petition embodying the answers which they had in the meantime prepared to Mr. Borrodaile's queries and praying that a regulation might be framed on the basis of those answers which they represented "as embracing the rights of inheritance and succession that are acknowledged by the Parsee nation". The Parsis then wanted to be protected (1) from the English Statute of Distribution in case of intestacy and (2) from the English Common Law relating to husband and wife by virtue of which the wife could exercise no independent disposing control during the life of her husband over any property whatever, not even over that which came to her or was given to her from or by her own family(a).

But nothing appears to have been done until 1855. On 20th August 1855 a meeting of the Parsees of Bombay was held in Seth Kawasjee Behramjee Fire Temple "to consider and adopt measures for procuring the enactment of laws

(y) 2 Bom. 57.

(z) *Palani Muduliar v. Natarajan*, (1942) M. 844, (1942) 1 M. L. J. 528.

(a) See *Sorabji Bangalee's Parsee Acts* pp. 156-157.

adapted to the Parsees". As a result of this meeting a committee was appointed "to prepare a Draft Code of Laws adapted to the Parsee nation and to petition the Legislative Council of India for the enactment thereof."

On 17th July 1856 the Privy Council decided the case of *Ardeeser Cursetjee v. Peerozebai*(b). That was a case for the restitution of conjugal rights filed by Peerozebai, daughter of Framjee Cowasjee Banajee against her husband on the Ecclesiastical side of the Supreme Court of Bombay. She alleged that her husband had declined to take her to his house and that she was compelled to live with her father; that since the death of her father her husband though he had never been divorced from her, had gone through the form and ceremony of a second marriage with one Bhicaiji and was living with her as man and wife, and had several children by her and had repudiated Peerozebai his lawful wife without any just cause and she prayed that the defendant be ordered to take her back and treat her with conjugal kindness, or if the defendant would not consent, to pay her Rs. 1,000 per month for life as alimony. The defendant filed a protest against the competency of the Court to entertain the suit. The case was argued before the Chief Justice Sir William Yardley and Sir Charles Jackson the Puisne Judge and they disagreed. The Chief Justice held that the Court had jurisdiction, the Puisne Judge held that it had not, and the judgment of the Chief Justice prevailed. Ardeeser, the husband appealed to the Privy Council and the judgment was delivered by the Rt. Hon. Dr. Lushington. His Lordship held that the Supreme Court was incompetent to take cognizance or to administer to the parties the Ecclesiastical law as used and exercised in the Diocese of London, that the English Ecclesiastical law was founded exclusively for all parties who were Christians and that for that reason a suit for the restitution of conjugal rights, strictly an Ecclesiastical proceeding, could not consistently with the principles and rules of Ecclesiastical law be applied to parties who professed the Parsee religion. The judgment was delivered on 17th July 1856 and once again the aid of the Legislature was deemed essential.

On 5th December 1859 the Managing Committee of the Parsee Law Association settled and adopted a body of rules which they entitled "a Draft Code of Inheritance, Succession and other matters," and on 31st March 1860 this Draft Code, accompanied by a petition was presented to the Legislative Council. The matter was referred to a Select Committee and on 19th May 1860 the Legislative Council directed the institution of certain inquiries by the Government of Bombay. On 13th June 1860 the Government of Bombay caused these inquiries to be instituted. On 10th August 1861 the Select Committee of the Legislative Council presented their report recommending that the Government of Bombay should be requested to appoint a commission to make a preliminary inquiry into the usages recognised as laws by the Parsee community of India and the necessity of special legislation in connection with them. On 26th December 1861 a commission was appointed by the Government of Bombay. The commission held meetings and took evidence written and oral. As regards inheritance, succession and property as between husband and wife the mofussil Parsees objected *in toto* to the rights of females to inherit on the death of male Parsees dying intestate and they also objected to the right of married women during coverture to hold or dispose of their separate property. The mofussil Parsees, however, agreed with the Bombay Parsees that the English Law of Inheritance and Succession and the English Law of Property as between husband and wife was absolutely unsuited to the requirements of the Parsee community. The commission negatively the contention that there should be one law of Inheritance and Succession for the Parsees in the town of Bombay and another for the Parsees of the mofussil.

The Parsee Law Commission made their report on 13th October, 1862.

The result was the introduction of two Bills in the Legislative Council of India, *viz.*, (a) Parsee Marriage and Divorce Bill and (b) Succession and Inheritance (Parsees) Bill. The Parsee Succession Bill was introduced on 17th February 1865. Its object was to exempt the Parsees from certain provisions of the Indian Succession Act which, when it was originally introduced into Council was known as Indian Civil Code Chapter I. That Bill was referred to the Select Committee on 24th February 1865 and it was passed by the Select Committee on 3rd March, 1865.

The Report of the Select Committee on the Parsi Succession Bill was presented on 31st March 1865. On 7th April 1865 the Report was considered. The Hon'ble Mr. Anderson when moving the Report for consideration stated that the President of the Parsee Law Association had urged on him that the Parsees should be exempted from the operation of sec. 108 of the Indian Succession Act (sec. 105 of the Indian Succession Act of 1865 and sec. 118 of the Indian Succession Act 1925)—“the section which may be called the Mortmain section”. He said, “I would remark that the section alluded to imports into India the 9th Geo. II Cap 36, commonly called the Statute of Mortmain. Now opinion may differ as to the propriety of that law, but it will be generally concluded that if such a law is made applicable to any portion of the community subject to the Succession Act it must be made applicable to all who are so subject. I freely admit the Parsees are not priest-ridden but there is a principle which underlies all laws of mortmain and which address itself to a sentiment of deeper growth than priestly influence; that sentiment is the desire which many men of all creeds and races feel on their death-beds to make terms, as it were, with the mysterious future by a liberality exercised at the expense of their heirs. It is one of the subtlest of those mixed questions of laws and morals to what extent a man is justified in influencing by testation the distribution of his property. The wisdom of successive generations has determined with reference to this kind of testation that there ought to be the most ample security, not merely that the testator is in possession of his faculties, but that his mind is in an entirely healthy state capable of looking before and looking after, and in no way throw off its balance by the fear of approaching dissolution. On consideration of this kind the laws of mortmain have been founded and to such consideration the Parsees are as subject as their fellowmen. I was unable, therefore, to recommend the amendment proposed by my friend to the Select Committee for adoption. And I may add that Parsees make such munificent use of the wealth during their lives that the Legislature is bound to guard, in some measure, their heirs from any testamentary profusion in favour of public objects which the fear of death may possibly suggest.” The Bill was then passed into Act with the title “The Parsee Intestate Succession Act 1865.” The material changes made by this Act were that the widow and the daughters of a Parsi dying intestate in the mofussil who were only entitled to maintenance for the first time got a share in the property.

In 1867 again an important decision as to the law governing Parsees in the Town of Bombay was given in *Naoroji Beramji v. Rogers*(c). This was a suit filed by Rogers for the specific performance of an agreement made by Naoroji to lease a property situate within the Fort of Bombay. Naoroji refused to perform the agreement contending that as the property was conveyed to him and his wife, and his wife refused to lease it. He further contended that the property was mortgaged to Hirjibhai and he refused to concur in granting the lease. He submitted that as the property was of the freehold tenure and as the Parsees were governed by English Law the concurrence of the wife and of the mortgagee to the granting of the lease was essential and as they refused to do so he was unable to perform the agreement. Mr. Justice Hore held that all immoveable properties in the Island

of Bombay were of the nature of chattels real or personal property and that as the property in question was conveyed to Naoroji and his wife and as according to English law marriage operated as a gift to the husband of all wife's chattels real Naoroji was entitled to let it without concurrence of his wife. Naoroji appealed. Westropp, J., delivered a classical judgment. He went into the history of the tenures of land in the Island of Bombay. In delivering the judgment and dismissing the appeal he has made the following observations: "Until recent legislation of the year 1865 the law universally applied to Parsees and their property in the Island of Bombay by the Supreme Court and since it was closed by the High Court at its Original Jurisdiction side has been as correctly stated in the clear and able Report of the Parsees Law Commission (of which Sir Joseph Arnold and Mr. Justice Newton were members) the English law, except so far as it is varied by Act IX of 1837 and also since the decision of the Privy Council in 1866 in *Ardeser Cursetji v. Prozebai(d)* except as to Matrimonial suits at the Ecclesiastical side of the Court, and, perhaps I shall add, except as to bigamy. Accordingly under that law the premises were either chattel real or real estate. If it was chattel real Naoroji and his wife were seized by entireties i.e., *per tout*. If real estate Naoroji was seized of the whole estate either in his own right or *jure uxoris* of the whole estate during the coverture and the demise by Naoroji was good." The Learned Judge, therefore, observed that "it was unnecessary and extrajudicial on the part of Mr. Justice Hore to decide whether the property was chattel real and still less unnecessary to decide whether all the immoveable property in Bombay was of that nature." According the judgment of Lower Court was reversed and the agreement was ordered to be carried out.

In 1868 the Parsee Chattels Real Act IX of 1837 was repealed by the Repeal Act VIII of 1868.

In the year 1868 the High Court of Bombay in *Manchersha v. Kamirunissa Begum(e)* held that the law applicable to Parsees in the Mofussil was Reg. IV of 1827 and in the absence of specific law by the rules of justice equity and good conscience.

In the year 1881 two important decisions were given as to the law governing the Parsees. In *Mithibai v. Limji N. Banaji(f)* the question raised was whether the rule in *Shelley's case* applied to Parsees. It was held that even assuming that the English law applied to Parsees the English law so to be applied could not include the rule in *Shelley's case*, which is the law of property or tenure based on feudal consideration and unsuited to the circumstances in India, and that in the absence of evidence of any specific law or usage applicable to a particular case, the law applicable to the Parsees in the mofussil of the Presidency of Bombay is that of justice, equity and good conscience alone. The other case is of *Maneckbai v. Meherbai(g)*. In that case the plaintiff sued the defendant alleging that her husband had shortly before his death conveyed to the defendant's husband who was the friend of the plaintiff's husband an immoveable property on trust (which was oral) communicated to the defendant's husband that he should sell the property and hold the sale-proceeds in trust for the benefit of the family of the plaintiff. The defendant denied the trust. It was held that the Parsees were governed by English law and the Statute of Frauds applied and as the trust was oral and as the Statute required a writing the plaintiff's suit failed. In delivering the judgment West, J., observed, "The powerful and exhaustive judgment in *Naoroji v. Rogers* establishes the general subjection of the inhabitants of Bombay as such to the English law and of that law the Statute of Frauds was an integral part. The Statute of Frauds applies to transactions not having any religious character or governed by family law. The Parsees are

(d) 6 M. I. A. 348.

(e) 5 B. H. C. R. (A.C.J.) 109.

(f) 5 Bom. 506 (In Appeal 6 Bom. 151.).

(g) 6 Bom. 363.

as subject to it as any inhabitants of Bombay. In *Payne & Co. v. Pirojsha Patel*(*h*) Messrs. Payne and Co acted as solicitors for the wife of the defendant in a matrimonial case and they filed a suit against the husband to recover the costs incurred by the wife in defending the suit. It was held that the common law of England applied to Parsees in the Island of Bombay under which the wife was entitled to pledge her husband's credit and defend herself at his costs in any action he may file against her for the dissolution of his marriage with her. It is not necessary that the wife should be successful in the suit. In *Hirabai v. Dinsha*(*i*) the question was in an action for slander of woman whether special damage must be shown and it was held that the Parsees in the city of Bombay were governed by the common law of England and special damage must be shown.

Even as late as 1941 in *Kuberdas v. Jerkish Navroji*(*j*) the question as to by what law the Parsees in the mofussil were governed was raised. In that case Tehmina, as the mother and natural guardian of her three minor children, after obtaining Letters of Administration to the estate of her husband had mortgaged the property of the husband to Kuberdas without any order of the Court. The mortgage was not executed by her as administratrix. It was argued on behalf of the mortgagee that the English law applied and the mortgage applied to the whole property. It was held that Tehmina as the natural guardian of the minors could not bind the interests of the minor children. It was observed that Parsees in the mofussil were in the absence of any statutory provision governed in the first place by usage and secondly by rules of equity and good conscience, *i.e.*, by the general principles of English law applicable to a similar set of circumstances.

Decisions construing provisions of the Intestate Succession Act, 1865.

The Parsee Intestate Succession Act remained in force upto 1925. While the Act remained in force the following important decisions were given on its construction. In *Mancherji K. Davar v. Mithibai*(*k*) it was held on a construction of sec. 5 that when a child of a Parsee intestate died in his or her lifetime and left only a widow or widower but no issue, such widow was entitled to a share, *c.g.*, if the intestate Parsee died leaving a widow, sons, daughters, children of a predeceased son, and widow of another predeceased son who had died without issue, and a posthumous daughter was afterwards born to the intestate, it was held that the widow of the predeceased son was entitled to one moiety of the share in the intestate's property which her husband would have taken had he survived the intestate, and that it was not a condition precedent to the application of sec. 5 that the predeceased son should have left both a widow and children. The other moiety of the share of the predeceased son devolved on the surviving issue of the intestate including the posthumous daughter and the children of his other predeceased son.

In *Erasha v. Jerbai*(*l*) the question raised was whether Jerbai the daughter of the intestate Parsee was entitled to grant of letters of administration to the estate of her father Ardeshir. Ardeshir had left a will in which he completely disinherited his daughter Jerbai and had bequeathed all his property to his brother Ratan-sha, but Ratan-sha having predeceased Ardeshir, the bequest to him lapsed and there was an intestacy. A caveat was filed against the grant. It was contended that Jerbai having been expressly excluded by Ardeshir by his will from taking any share in his property, she was not entitled. But it was held that Ardeshir having died intestate the estate must go according to law notwithstanding the exclusion of her under the will and Jerbai was entitled to the grant and the property should be distributed between the widow and children of Ardeshir.

(*h*) 13 Bom. L. R. 920.

(*i*) 28 Bom. L. R. 391.

(*j*) 48 Bom. L. R. 981.

(*k*) 1 Bom. 349.

(*l*) 4 Bom. 537.

In *Jehangir v. Pirozbai(m)* the question was as to the meaning and construction of the word "widower." Dhunjibai, a Parsi of Surat, died intestate, leaving a widow and two daughters. A third daughter Jaiji had predeceased her father leaving her husband (plaintiff) and a daughter. The husband of Jaiji had married again before the death of the intestate and was married at the date of the suit. He claimed a share in Jaiji's share under sec. 5. His claim was opposed on the ground that he was not a "widower" he having remarried. In Johnson's Dictionary a widower is defined as "one who has lost his wife," and in Webster's Dictionary a widower is defined as "a man who has lost his wife by death and has not married again." But it was held that the word "widower" used in sec. 5 "is meant a widower relating to the deceased wife only and without consideration of the fact or possibility of the widower remarrying," and the plaintiff was held entitled to a share. Under the present Act this is now no longer the law. (See commentary to sec. 53).

In *Shapoorji v. Rustamji(n)* the question was whether the English law of freehold property in remainder applied to Parsis. In that case one Ratanbai died leaving a husband, two sons and three daughters. Under the will of her deceased father Ratanbai had a vested remainder after the death of the life tenant her mother Villerbai. Ratanbai predeceased Villerbai and the vested remainder consisted of an immoveable property in Bombay. The husband of Ratanbai claimed the whole share of the vested remainder, on the ground of English law as a tenant by courtesy in remainder but it was held that the case was governed by the Parsi law of Intestate Succession, that there was no distinction in that Act between an estate in possession and an estate in remainder. It applied to any Parsi woman dying possessed of property after the Act came into operation. Ratanbai having died intestate in respect of her remainder, her share would go to the husband and her children according to the proportions laid down in sec. 2 of the Act. Each of the child took 1/6, i.e., the two sons and 2 daughters took 2/3 and the husband took 1/3.

In *Shapoorji v. Dossabhoy(o)* one Goolbai, daughter of Aimai, was married to the plaintiff before the Parsi Intestate Act came into operation. Aimai died in 1881 leaving a will whereby she bequeathed her immoveable properties in Poona to her daughter Goolbai. Goolbai died in 1900 intestate leaving her husband (plaintiff) and certain nephews. The husband claimed the whole property contending that as Goolbai was married to him before the Act came into operation, the English law applied and by virtue of the English law of personalty applicable to a married woman her separate use was extinguished on her death, and the plaintiff became the beneficial owner. This contention was not upheld and it was held that the Act applied and according to sec. 6 the husband was entitled to a half share and the other half went to the nephews.

In *Hirjibhoy v. Barjorji(p)*, the question involved was the construction of sec. 7 and Art. 2 of the 2nd Schedule and the distribution of the property of a Parsee dying intestate whose nearest relations were the lineal descendants in different degrees of predeceased brothers and sisters. Article 2 read with sec. 7 gives the estate to "brothers and sisters and the lineal descendants of such of them as shall have predeceased the intestate." In this case the intestate female Parsi had left no brothers or sisters but she left lineal descendants in different degrees of two predeceased brothers and one predeceased sister. The question raised was whether the estate was to be divided *per capita* among all the persons within the description of the lineal descendants of a brother or sister in equal shares subject to the rule that each male is to take double the share of each female standing in the same degree of propinquity or whether the estate was to be divided *per*

(m) 11 Bom. 1

(n) 5 Bom. L. R. 252.

(o) 30 Bom. 359; 1 Bom. L. R. 988.

(p) 22 Bom. 909.

stirpes and if so what *stirpes* should be taken as the basis of division and it was held that the property should be divided according to the rule in *Gibson v. Fisher*(q) that the first division should be into three shares, two shares to each of the two brothers who left lineal descendants, and one share to the sister who left lineal descendants, and the shares should be sub-divided among their respective lineal descendants, no descendant being entitled to share concurrently with his or her ancestor, and on each division and sub-division each male taking double the share of each female standing in the same degree of propinquity.

When the Indian Succession Act XXXIX of 1925 was enacted, the Parsi Intestate Succession Act was bodily incorporated in Chapter III verbatim and without any change and by Schedule IX of that Act the Parsee Intestate Succession Act XXI of 1865, was repealed.

In the year 1936 a curious question arose in the case of *Ratanshaw v. Bamanji*(r). In that case one Dorabji who was a resident of Baroda State died intestate leaving immoveable property in Bombay. Prior to his death he had divorced his wife Hirabai by a mutual *fargat* which was a valid divorce according to the custom prevailing in Baroda State. After this divorce he married Maneckbai and on her death he married a third wife Khurshedbai who had a daughter Baimai by her former husband. Dorabji left Khurshedbai, her daughter Baimai, Cooverbai his daughter by his divorced wife Hirabai, the widow and four children of his brother Dhunjisha and a sister Avabai. The plaintiff claimed a share through Khurshedbai. The question was whether the divorce of Heerabai by *fargat* could be deemed to be a legal divorce for determining succession to immoveable property in British India. It was held that under sec. 5 of the Indian Succession Act of 1925 succession to immoveable property in British India should be regulated by the law of British India, that the divorce by *fargat* could not be recognised and Heerabai's divorce was not valid and that she continued to be the wife of Dorabji. His subsequent marriage with Khurshedbai was not a legal marriage and conferred no right on her and as the plaintiff's claim was through Khurshedbai, the suit failed. In the year 1938 in the matter of the petition for probate of the will of Sorabji B. Kapadia deceased, a question arose as to the payment of probate duty on the shares of certain joint stock companies which stood in the joint names of the deceased and his wife. The superintendent of stamps contended that the shares belonged to the estate of the deceased and duty was payable; the widow contended that no duty was payable as she was the survivor of the joint tenants. Somjee J., held that the Parsis were governed by the common law of England. The shares belonged absolutely to the widow and therefore no duty was payable. The judgment is not reported but it was delivered on 28th January 1938.

The Amending Act XVII of 1939.

This Act was enacted under the following circumstances :—In 1933 the Council of the Parsi Central Association submitted a Draft Bill for the opinion of the Parsi public. The objects of the new Bill were :—

- (a) The improvement of the position of the widow and of the daughter (relatively to the son) in respect of succession to the property of a male Parsi intestate.
- (b) The allotment of a share in the estate of a male Parsi intestate to his father and mother.
- (c) The exclusion of the widower of a predeceased daughter of the intestate from the share given to him under sec. 54 of the Indian Succession Act; and
- (d) The improvement of the position of widows of lineal descendants of the intestate.

The Trustees of the Parsi Panchayat revised and prepared a new draft Bill and the draft Bill was finally adopted by the Council of the Parsi Central Association in 1933. The draft Bill was referred to the Select Committee who made their Report. It was introduced into the Council of State by the Hon'ble Mr. Maneksha Nadirsha Dalal and in the Legislative Assembly by Sir Cowasjee Jehangir, Bart., and was passed as Act XVII of 1939 called the Indian Succession (Amendment) Act.

By the Indian Succession (Amendment) Act XVII of 1939 sections 50 to 56 (both inclusive) have been substituted for the sections 50 to 56 as originally enacted by Act XXXIX of 1925. The Act XVII was repealed by Act XXV of 1942 and its sections are now incorporated in the Act XXXIX of 1925.

The Amending Act XVII of 1939 received the assent of the Governor-General on 21st April 1939 and came into force on 12th June 1939, (see notification published in the Gazette of India, 20th May 1939, Part I p. 854.)

Changes made by the Act.

The Act makes several fundamental changes in the law of intestate succession relating to Parsis. The first fundamental change effected is to increase the proportional share of the widow and of the daughter in relation to that of the son in respect of succession to the property of a male Parsi intestate. Under the repealed Act the share of the son was 4, the share of the widow 2, and the share of the daughter 1. Under this Act the son gets 2, the widow gets 2, and the daughter gets 1. There is a further fundamental change effected under this Act as regards the father and mother of a male Parsi intestate. Whereas under the repealed Act, if a Parsi male died intestate leaving a widow and children, the father and mother did not get any share; under this Act the father gets a share equal to half the share of the son and the mother gets a share equal to half the share of the daughter. There are also changes as regards the widower of a predeceased daughter of the intestate who is excluded and as regards widows of predeceased lineal descendants of the intestate who are included in the list of sharers.

Scope and Application of the Act.—The Act is not retrospective. It applies to all cases of intestate succession when a Parsi dies intestate, i.e., without leaving a will, and to all intestacies occurring under a testamentary or non-testamentary document even where such document is executed before the passing of this Act, provided the intestacies under such documents occur after the passing of this Act.

The Act applies to all Parsis residing in British India.

Statement of Objects and Reasons.

“At present the law that governs intestate succession among Parsis is that laid down in 1865 in Act No. XXI of that year. It is true the said Act has been repealed by the Indian Succession Act No. XXXIX of 1925 but this has made no change in the law, as all the provisions of the Act of 1865 have been incorporated *verbatim* in sections 50 to 56, and Schedule II, Parts I and II, of the Act of 1925. It has been felt for a long time by members of the Parsi Community that this enactment, more than 70 years old, requires amendment both in form and substance for various reasons. The meaning of some of its provisions is doubtful; some of these doubts have been removed by judicial decisions. It is also incomplete in some respects, and some of these deficiencies have had to be supplied by other judicial decisions. Certain other changes seem necessary in accordance with present-day Parsi sentiment and usage. The arrangement and language also require some revision. In order to remove doubts, supply deficiencies, incorporate as far as possible the judicial decisions which the community has accepted, introduce changes commonly desired and make the arrangement more systematic it has been thought best to redraft the whole enactment. In making this redraft, so far as

arrangement and language are concerned, other parts of the Act of 1925 have as far as possible been followed, e.g., by introducing sub-headings as in the previous Chapter relating to intestate succession among non-Parsis, so as to give a grasp of the subject as a whole. For convenience the new sections of the Draft Bill have been numbered 50 to 56 so that they may be substituted for the original sections of the Act of 1925 now in force."

The Act applies to all the property of a Parsi dying intestate except Agricultural lands having regard to item No. 21 of List II in the Government of India Act, 1935. By sec. 100 of the Government of India Act it is the Provincial Legislature alone that can make any law for a Province with respect to matters enumerated in List II and Art. 21 of the said List provides that it is the province of the Provincial Legislature alone to enact any law relating to transfer, alienation and devolution of agricultural land. This question was raised when the Hindu Women's Rights to Property Act was passed by the Central Legislature, and in order to clear up the defect the matter was taken to the Federal Court. The question was referred to the Federal Court for decision by the Governor-General under sec. 213 of the Government of India Act. On a special reference under sec. 213 of the Government of India Act, 1935, the Federal Court gave its decision on 22nd April 1941. The Court decided that the Hindu Women's Rights to Property Act XVIII, 1937 and the Amending Act XI of 1938 did not operate to regulate succession to agricultural land in the Governor's Provinces while they did operate to regulate the devolution by survivorship to property other than agricultural land. To remedy this the Bombay Government enacted Bombay Act XVII of 1942 to regulate the rights of succession to agricultural land belonging to Hindus.

Until, therefore, a similar Act is passed by the Bombay Government, the Act XVII of 1939 will not apply to succession to agricultural land and the law governing the succession to agricultural land in case of an intestate Parsi will be the old Act of 1865. The Government of India Act, 1935, does not contain any specific provision relating to the power to repeal laws. Sec. 292, however, provides that certain laws shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority. As the Central Legislature could not enact any law relating to succession to agricultural land, the Act XVII of 1939 (Parsi Intestate Succession Act) only repealed the law as to succession to property of all kinds except agricultural land, and, therefore, so far as succession to agricultural land is concerned, the law remains as it was before.

What is Agricultural Land.:—In List II Entry 21 of the Government of India Act agricultural land has not been defined. It must accordingly be understood in the sense which it ordinarily bears in the English language. The word "land" in List II Entry No. 21 comprises both corporeal and incorporeal rights and interests. As regards "agricultural land" the word "agriculture" has been variously defined in several English and Indian Statutes. In some cases the Courts have placed a restricted interpretation on the expression "agricultural purposes" (s). In *Murugesu v. Chinnathambi* (t) the expression "agricultural purposes" occurring in sec. 117 of the Transfer of Property Act was discussed and it was pointed out that "agriculture" was used in a narrow sense as well as in a more general sense, and that the latter comprehended not merely the raising of grain or food crops, but also the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of men and beast, including gardening or horticulture, and the raising or feeding of cattle and other stock. One of the learned Judges who had held in an earlier case that

(s) See *Chandrasekhara v. Duraisami*, 54 Mad. 900.

(t) 24 Mad. 421.

land used for a coffee garden was not used for an "agricultural purpose" stated in this judgment that on further consideration he was of the opinion that his earlier view was wrong. In *Kaju Mal v. Saligram*(u), their Lordships of the Privy Council, while dealing with a definition in the Punjab Alienation Act, confirmed the decision of the Punjab Chief Court to the effect that the land used, as a tea garden was used for "agricultural purpose." In *Murugesu v. Chinnathambi*(v) it was held that a lease of land for the cultivation of betel is an "agricultural lease." In *Pavadai v. Ramasami*(w) a lease of land for of growing casuarina tree was held to be a lease for agricultural purposes. But see contra *Chandrasekhara v. Duraisami*(x).

"Agriculture" cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on. But in *Kesho Prasad v. Sheo Prakash*(y) it was held that the land held for the purpose of a mango grove was not held for agricultural purpose. But a mango grove was held to be agricultural land(z). All these cases (except the last) were considered by their Lordships of the Federal Court in *Mcgh Raj v. Alla Rakkia*(a) in which they observed, "It may on a proper occasion be necessary to consider whether for the purposes of the relevant entries in Lists II and III it will not be right to take into account the general character of the land (as agricultural land) and not the use to which it may be put at a particular point of time. It is difficult to impute to Parliament the intention that a piece of land should be so long as it is used to produce certain things be governed by and descend accordingly to laws framed under List II but that when the same parcel of land is used to produce something else (as so often happens in this country) it should be governed by and descend accordingly to laws framed under List III". (See Federal Court Journal, 1944, p. 19).

Special Rules for Parsi Intestates

General principles relating to intestate succession.

50. For the purpose of intestate succession among Parsis—

- (a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;
- (b) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or a widow of any lineal descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and
- (c) where a widow of any relative of an intestate has married again in the lifetime of the intestate, she shall not be entitled to receive any share of the

(u) 51 I. A. 11.

(v) 24 Mad. 421.

(w) 45 Mad. 710.

(x) *Chandrasekhara v. Duraisami*, 54 Mad. 900.

(y) 44 All. 19 (F. B.).

(z) *Sarojinidevi v. Subrahmaniam*, (1945) Mad. 61.

(a) A. I. R. (1942) F. C. 38.

property of which the intestate has died intestate, and she shall be deemed not to be existing at the intestate's death.

Sub-sec. (a)

This sub-section corresponds to sec. 27 (c) of the Indian Succession Act, 1925, According to this section a child *en ventre sa mere* is deemed to be in existence at the time of the father's death. The want of an explicit provision on this point had raised difficulties but the Bombay High Court had acknowledged the right of a posthumous child in *Mancherji v. Mithibai*(b).

Sub-sec. (b)

This sub-section is explanatory. If a child or remoter issue of a Parsi intestate has predeceased him, the share of such a child shall not be taken into consideration provided such predeceased child has left neither (a) a widow or widower nor (b) a child or children or remoter issue nor (c) a widow of any male lineal descendant of such predeceased child. If a predeceased child of a Parsi intestate leaves behind him or her any of the above mentioned relatives then such a child's share shall be counted in making the division as provided in sec. 53.

Sub-sec. (c)

Sec. 54 of the Indian Succession Act enacted, "If any child of a Parsi intestate has died intestate in his or her lifetime, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death." Accordingly it was held in *Jehangir v. Pirojbai*(c), that a widower of a predeceased daughter of the intestate was entitled to a share even though he had remarried.

This decision that a widower who had remarried was entitled to a share although legally correct was against the sentiment of the Parsi community. Similarly Parsi sentiment was averse to giving a share to a widow of the son or other lineal descendant of the intestate if she had remarried in the lifetime of the intestate as she was regarded as no longer a member of her husband's family. This sub-section is enacted to give effect to this sentiment. In this sub-sec. a widow of a relative who has remarried is excluded. The widower is excluded by sec. 53(c).

Division of a male intestate's property among his widow, children and parents.

51. (1) Subject to the provisions of sub-section (2), the property of which a male Parsi dies intestate shall be divided—

- (a) where he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or
- (b) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(2) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.

According to this section the division in the case of a **male** Parsi is as follows.

(1) (a) Widow and children but no parents -

daughter	widow	son
1	2	2

Under the old Act (sec. 50) the division was --

daughter	widow	son
1	2	4

(b) No widow and no parents but only children -

daughter	son
1	2

Under the old Act the division was--

daughter	son
1	4

(2) (a) Widow and children and father and mother -

daughter	widow	son	father	mother
1	2	2	1	$\frac{1}{2}$

(b)

daughter	father
1	1

Note :—The word “ children ” may be children of the widow who survives the intestate or the children of the intestate male by his predeceased wife. Although sec. 27 which does away with the distinction between full blood and half blood relationship does not apply to Parsis (sec. 28), there is no distinction regarding succession in the case of a Parsi intestate between full blood and half blood. In Schedule II, Part I, item (2) and in Schedule II, Part II, item 2 only uterine brothers and sisters are excluded. These words did not occur in Schedule II Part II of the old Act. Accordingly a step-son or a step-daughter, that is, the son or daughter of the widow of the intestate by her first or previous husband is not included.

Adopted Son or Palak.—There prevailed amongst Parsis a custom of taking a Palak son but it is now getting extinct. In the report of the Commission appointed to draft the Bill of Intestate Succession, 1865, a suggestion was made to make a provision to the effect “that nothing herein contained shall prevent the adoption by any Parsee of a Plak in his lifetime nor the appointment after his death of a Dharam pootra for the performance of his funeral ceremonies but this was not incorporated in the Bill (see Bengalee’s Parsee Act p. 186.) In *Jehangir v. Kaikhushru(d)*, a claim was made by a Palak son as claiming within the word “son” under the will of a Parsi but his claim was negatived. The case went up to the Privy Council and the question was raised “whether such a Palak could ever take under the will.” But their Lordships decided the case on other points and observed that, however interesting the question was, it was not necessary for them to pronounce any opinion, (see p. 308 of the Report). In *Kersaji v. Kaikhushru(e)*, it was observed that although in Baroda State a custom prevailed of taking

Palak but such a custom could not be recognised in British India in respect of succession to immoveable property in British India.

Even in the case of an Indian Christian to whom this Act applies it was held that there can be no question of adoption of a son in the sense that he becomes entitled to succession to his estate(e).

Alien Wife and Children of an Alien Wife of a Parsi.—The Act requires that the intestate should be a Parsi. The word “Parsi” is not defined in this Act. It is defined in the Act III of 1936, (The Parsi Marriage and Divorce Act); but it has been the subject-matter of two decisions(f). According to these decisions the word “Parsi” includes “the children of a Parsi father by an alien mother, if such children are admitted into the religion of their father and profess the Zoroastrian religion.” Only the *children* of any alien mother by a Parsi father who are admitted into the Zoroastrian religion are called Parsis. The alien wife or widow even though she be admitted into the Zoroastrian religion and married to a Parsi according to Parsi law is not a Parsi. Also the children of a Parsi mother by an alien father are not Parsis. The conclusion to be drawn from these two cases as regards succession and inheritance is that an alien widow and her children by a Parsi father, whether admitted into the Zoroastrian religion or not, would in case of the intestacy of a Parsi father inherit under these sections, but if the alien wife or widow of a Parsi should die intestate the inheritance to her estate would not be governed by these sections as she is not a Parsi.

Parents.—As regards parents, it may be noted that the mother is the widow of a relative within the meaning of section 50 (c) and would lose her share if she has remarried in the lifetime of her son; but if the father has remarried he will not lose his share.

It may also be noted that the *parents* get a share under this section in the case of the *son* dying intestate only and not in case of the *daughter* dying intestate.

The word “parents” include father and mother but not a step-father or a step-mother(g).

Division of a female intestate's property among her widower and children.

52. The property of which a female Parsi dies intestate shall be divided—

- (a) where she dies leaving a widower and children, among the widower and children so that the widower and each child receive equal shares, or
- (b) where she dies leaving children but no widower among the children in equal shares.

This section corresponds to section 51 of the old Act with one variation, *viz.*, the share of the widower is reduced from double the share of the child to a share equal to that of the child.

According to this section the division in the case of a *female* Parsi intestate is as follows :—

(a) Widower and children—

widower	son	daughter
1	1	1

(b) No widower but only children—

son	daughter
1	1

(e) *Ranbirsingh v. J. C. Bhattacharji*, (1940) All. 100.

Jijibhoy, 83 Bom. 509 and *Saklat v. Bella*, 58 I. A. 42.

(f) *Sir Dinsha Maneekji Petit v. Sir Jamsetji*

(g) *Rutland v. Rutland*, 2 P. Wms. 216.

53. In all cases where a Parsi dies leaving any lineal descendant, if any child of such intestate has died in the lifetime of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death shall be in accordance with the following rules, namely—

Division of share of predeceased child of intestate leaving lineal descendants.

(a) If such deceased child was a son, his widow and children shall take shares in accordance with the provisions of this Chapter as if he had died immediately after the intestate's death: Provided that where such deceased son has left a widow or a widow of a lineal descendant but no lineal descendant, the residue of his share after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate, and in making the division of such residue the said deceased son of the intestate shall not be taken into account.

(b) If such deceased child was a daughter, her share shall be divided equally among her children.

(c) If any child of such deceased child has also died during the lifetime of the intestate, the share which he or she would have taken if living at the intestate's death shall be divided in like manner in accordance with clause (a) or clause (b) as the case may be.

(d) Where a remoter lineal descendant of the intestate has died during the lifetime of the intestate, the provisions of clause (c) shall apply *mutatis mutandis* to the division of any share to which he or she would have been entitled if living at the intestate's death by reason of the predecease of all the intestate's lineal descendants directly between him or her and the intestate.

The corresponding section under the old Act was sec. 54 which was as follows:—

“ If any child of a Parsi intestate has died in his or her lifetime, the widow or widower and issue of such child shall take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death.” That section had the advantage of simplicity. The present section is complicated on account of two underlying ideas: (a) exclusion of the widower of any predeceased daughter or of other lineal descendant from being one of the sharers whether such widower had or had not married again and (b) inclusion of the widow of any predeceased son of the intestate or of his lineal descendant provided she had not remarried at the death of the intestate. Under the old Act in *Mancherji v. Mithibai*(h), it was contended that for the widow or widower to take, and for the issue to take there should be in existence at the time of the death of the intestate both widow or widower and issue; but it was held that it was not a condition precedent to the application of sec. 6 of Act XXI of 1865 (the Parsi Intestate Succession Act) that the prede-

ceased son of an intestate Parsi should have left a widow and issue and the widow of the predeceased son who had left no issue was entitled to a moiety of the share coming to the predeceased son. Effect is given to this decision under section 53, sub section (a) and the Proviso. But such a widow if she has remarried would lose her share under sec. 50 (c).

Another change effected is the exclusion of the widower of any predeceased child of the intestate. In *Jehangir v. Pirozbai(i)*, a Parsi had died intestate leaving a widow, two daughters and the heirs of one predeceased daughter, viz., her husband and one daughter. The husband of the predeceased daughter had married again. It was contended that such a person was not a widower within the meaning of section 5. In Webster's dictionary a widower is defined "a man who has lost his wife by death and has not married again." But it was held that by the word "widower" in the section was meant a widower relatively to the deceased wife only and without consideration of the fact or possibility of the widower remarrying and he was entitled to a share. This decision was against the sentiment of the Parsi community and under the present Act it is no longer law as the word "widower" is expressly omitted from sec. 53 (b) and the division is among the children of the predeceased daughter. The widower of any female lineal descendant is also excluded under sec. 53(c) as the division is according to sub-section (a) or (b) as the case may be. The fact that such widower has or has not remarried is also immaterial.

Another important point to be noted under this section is that there is no express provision regarding distribution in the event of all the children of the Parsi intestate predeceasing him leaving lineal descendants who survive the intestate, i.e., if the Parsi intestate only leaves behind him grandchildren or great-grandchildren. In the Bill sec. 50 (f) provided for such an event and the distribution was *per stirpes* but it is omitted in the Act. Under clause (d) of this section the division will be *per stirpes* and not *per capita* as under sec. 38 of this Act.

Examples.

(1) Example under sub-section (a)—share of predeceased son when he leaves a widow and children.

A dies leaving—

Father	Mother	Widow	Daughter	Son	Predeceased son
$1 = \frac{2}{17}$	$\frac{1}{2} = \frac{1}{17}$	$2 = \frac{4}{17}$	$1 = \frac{2}{17}$	$2 = \frac{4}{17}$	$2 = \frac{4}{17}$
					<div style="display: flex; justify-content: space-around; align-items: center;"> <div style="text-align: center;"> Daughter $\frac{4}{85}$ </div> <div style="text-align: center;"> Son $\frac{8}{85}$ </div> <div style="text-align: center;"> Widow $\frac{9}{85}$ </div> </div>

The property will be divided into $8\frac{1}{2}$ parts and the two parts of the predeceased son will be divided into 5 parts and the shares will be as above.

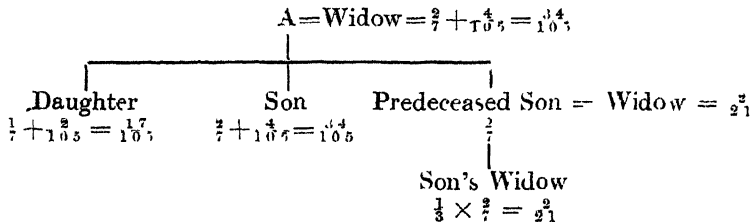
(2) Example under Proviso of sub-section (a) when the predeceased son leaves no issue but only leaves a widow.

A = widow = $\frac{2}{7} + \frac{2}{35} = \frac{1}{3}$			
Daughter $\frac{1}{7} + \frac{1}{35} = \frac{4}{35}$	Son $\frac{2}{7} + \frac{2}{35} = \frac{1}{3}$	Predeceased	Son = Widow = $\frac{1}{7}$
		$\frac{2}{7}$	

In this case the first division will be into 7 parts :— $\frac{1}{7}$ to the daughter ; $\frac{2}{7}$ to the son ; $\frac{2}{7}$ to the widow and $\frac{2}{7}$ to the predeceased son. The second division of the $\frac{2}{7}$ of the predeceased son will be into two parts under sec. 54(a) and $\frac{1}{7}$ will go to his widow.

The remaining $\frac{1}{7}$ which is the "residue" will belong to A and will be divided into five parts only as the predeceased son "shall not be taken into account" and $\frac{1}{5}$ of $\frac{1}{7}$ will go to the daughter of A; $\frac{2}{5}$ of $\frac{1}{7}$ to the son of A and $\frac{2}{5}$ of $\frac{1}{7}$ to the widow of A and the total shares will be as above.

(3) Example under Proviso of sub-section (a) when the predeceased son leaves no issue but a widow and a widow of a lineal descendant.

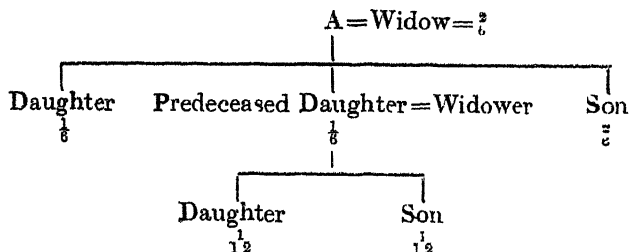


In this case the first division will be into 7 parts :- daughter will take $\frac{1}{7}$, son $\frac{2}{7}$, widow $\frac{2}{7}$, and predeceased son $\frac{2}{7}$.

The $\frac{2}{7}$ of the predeceased son will be divided under sec. 54 (b) as he has not left lineal descendants and $\frac{1}{3}$ of $\frac{2}{7} = \frac{2}{21}$ will go to his widow and $\frac{2}{21}$ to the widow of the son of such predeceased son. The remaining $\frac{2}{7}$ (viz., the "residue of his share") will belong to the intestate A and will be divided into five parts (as the predeceased son shall not be taken into account) in the proportion of 1 share to daughter, 2 shares to son and 2 shares to widow and the shares will be as above.

Examples.

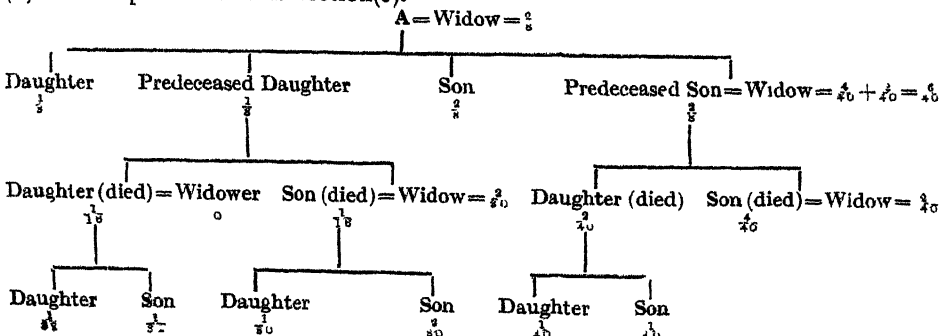
(1) Example under sub-section (b)—share of predeceased daughter when she leaves a widower and children.



The first division will be into six parts, 1 part to daughter, 1 part to predeceased daughter, 2 parts to son and 2 parts to the widow.

The second division of the $\frac{1}{6}$ th share of predeceased daughter will be equally between her daughter and son, the widower taking no share.

(2) Example under sub-section (c).



In this illustration A has died leaving (1) a widow, (2) a daughter, (3) the relations of a predeceased daughter, namely, (a) her daughter's widower, (b) her son's widow, (c) her grandchildren; (4) a son; and (5) relations of a predeceased son, namely, (a) his widow, (b) grandchildren of his predeceased daughter, (c) the widow of his predeceased son.

First division will be into eight parts under sec. 51.

Second division of $\frac{1}{8}$ of predeceased daughter will be equal between her daughter and son under sec. 53 (b) each taking $\frac{1}{16}$.

Third division will be $\frac{1}{16}$ of grand-daughter equally between great-grand-daughter and great-grandson to the exclusion of the widower again under sec. 53(b).

Fourth-division will be of the $\frac{1}{16}$ th share of the son of the predeceased daughter between his widow and daughter and son under sec. 53(a) into 5 parts.

The next division will be of the $\frac{3}{8}$ share of the predeceased son. It will first be divided into five parts—daughter 1, son 2, and widow 2.

The $\frac{2}{40}$ th share of the grand-daughter will be equally divided between her daughter and son.

The $\frac{4}{40}$ th share of the grandson will be divided under sec. 54(a) and half will go to his widow and the other half to his mother, *i.e.*, the widow of the predeceased son under Schedule II, Part I, under sec. 54(d).

Division of property where intestate leaves no lineal descendant but leaves a widow or widower or a widow of any lineal descendant.

54. Where a Parsi dies without leaving any lineal descendant but leaving a widow or widower or a widow of a lineal descendant, the property of which the intestate dies intestate shall be divided in accordance with the following rules, namely:—

(a) If the intestate leaves a widow or widower but no widow of a lineal descendant, the widow or widower shall take half the said property.

(b) If the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one-third of the said property, and the widow of any lineal descendant shall receive another one-third, or if there is more than one such widow, the last mentioned one-third shall be divided equally among them.

(c) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one-third of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two-thirds of the said property shall be divided among such widows in equal shares.

(d) The residue after the division specified in clause (a), (b) or (c) has been made shall be distributed among the relatives of the intestate in the order specified in Part I of Schedule II. The next-of-kin standing first in Part I of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed

that each male shall take double the share of each female standing in the same degree of propinquity.

(e) If there are no relatives entitled to the residue under clause (d), the whole of the residue shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.

This section corresponds to section 55 of the old Act with considerable changes owing to the introduction of a new sharer, *viz.*, the widow of a lineal descendant. The distribution according to this section is as follows :—

- (a) Widow or widower but no children and no lineal descendant nor widow of any male lineal descendant.

Widow or widower	Relatives in Schedule II, Part I
$\frac{1}{2}$	$\frac{1}{2}$

- (b) Widow or widower Widow of lineal descendant Relatives in Sch. II, Part I
- | | | |
|---------------|---|---------------|
| $\frac{1}{3}$ | $\frac{1}{3}$ | $\frac{1}{3}$ |
| | if more than one
equally <i>inter se</i> | |

- (c) No widow or widower but one widow of lineal descendant then the division is as under :—

(i) One widow of lineal descendant	Relatives in Sch. II, Part I.
$\frac{2}{3}$	$\frac{1}{3}$

(ii) More than one widow of lineal descendants.	Relatives in Sch. II, Part I,
$\frac{2}{3}$	$\frac{1}{3}$

- (d) Relatives in Schedule II.

Father and mother
2 1
Brother and sister
2 1

Sch. II, Part I.

(1) “**Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.**”—

Under the old Act Schedule II, Part I the words “other than uterine brothers and sisters” did not occur and the words “and the children or lineal descendants” occurred. The words “and the children” are omitted as being redundant.

The words “brothers” and “sisters” in this article refer to brothers and sisters on the father’s side without reference to who the mother is. All brothers and sisters by the same father, whether by the same mother or by different mothers come and share under this article. The words “brothers” and “sisters” refer to brothers and sisters of the full blood as also brothers and sisters of the half blood. But a step-brother, *i.e.*, a brother by the same mother but of a different father will not share.

If brothers and sisters are alive they exclude other relatives. The expression “brothers and sisters and the lineal descendants of such of them as shall have

predeceased the intestate " has given rise to some doubt whether the word " and " is to be taken cumulatively or whether the lineal descendants of brothers and sisters will take in preference to other relatives. When there are no brothers and sisters, but there are children of a deceased brother or sister, and also a paternal grand father or grandmother, the children of the deceased brother or sister will take in preference to the paternal grandfather or grandmother by virtue of the provisions contained in Section 55 read with Schedule II, Part II

If there are brothers and sisters and the lineal descendants of such of them as shall have predeceased the intestate, the primary division is *per stirpes*, i.e., each surviving brother will take an equal share with the lineal descendants of the deceased brother collectively. In any given degree each male will take double the share of a female, e.g., a brother takes double the share of a sister, a nephew double the share of a niece. But between different degrees the rule of each male taking double the share of each female does not apply, e.g., a grandnephew does not take double the share of a niece nor a great-grandnephew double the share of a grandniece. The words " lineal descendants " are substitutional. If all the brothers and sisters are dead and there are lineal descendants in different degrees the division is again *per stirpes* and not *per capita*(j).

(2) **Grandfather and grandmother.—**

Grandfather and grandmother on the father's side are meant, i.e., paternal grandfather and paternal grandmother. If both the paternal grandfather and paternal grandmother are alive the division will be in the proportion of 2 to 1. The division is the same under Schedule II, Part II.

(3) **Grandfather's sons and daughters, and the lineal descendants of such of them as have predeceased the intestate.—**

After grandfather and grandmother come the paternal uncle and aunt of the intestate and their lineal descendants. They will only come in if neither paternal grandfather nor paternal grandmother is alive. If either of them is alive, he or she will exclude them. The lineal descendants of paternal uncles and aunts will only share if a paternal uncle or aunt is alive : but if no paternal uncle or aunt is alive but only their lineal descendants then they being of the fourth or remoter degree will be excluded if the great-grandfather or great-grandmother of the intestate is alive, being of the third degree.

(4) **Great-grandfather and great-grandmother.**

(5) **Great-grandfather's sons and daughters and the lineal descendants of such of them as have predeceased the intestate.**

55. When a Parsi dies leaving neither lineal descendants nor a widow or widower nor a widow of any lineal descendant, his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property

Division of property where intestate leaves neither lineal descendants nor a widow or widower nor a widow of any lineal descendant.

shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

This section corresponds to sec. 36 of the old Act.

The distinction between sections 54 and 55 is that under section 54 the division is to be made when there is a widow or widower but no lineal descendants, whereas this section comes into operation only when there is neither widow or widower nor lineal descendants,^(k). The scheme of distribution in Part II of Schedule II is first the paternal relatives are to be exhausted upto paternal great-grandfather and paternal great-grandmother and their lineal descendants; then the relatives from the mother's side are to be exhausted upto maternal grandfather and maternal grandmother and their children and lineal descendants; then the outsiders are allowed to get in, viz., first, the son's widow if she has not remarried, then the brother's widow if she has not remarried and so on; after the widows the widowers of the daughters, if they have not remarried, share; then again the maternal great-grandfather and mother come in and lastly the paternal grandmother's father and mother come and then their children and lineal descendants. It is a most complicated mode of distribution. The word "next-of-kin" used in this section is synonymous with relatives^(l).

Division of property where there is no relative entitled to succeed under the other provisions of this Chapter.

56. Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him.

(k) *Erasha v. Jerbai*, 4 Bom. 537.

(l) *Hirjibhai v. Barjaji*, 22 Bom. 909 at p. 920.

PART VI.

Testamentary Succession.

CHAPTER I.

Introductory.

Application of certain provisions of Part to a class of wills made by Hindus, etc.

57. (1) The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Provincial Government of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b).

Provided that marriage shall not revoke any such will or codicil.

[This section is not applicable to the Punjab State Railway Lands (See Notification Gazette of India, Part I, 16th September 1939, p. 171].

By the Western India States Administration Order (1942) this section is omitted from application in the territories included in Thana Circle Civil Stations, and Sadra Bazar in the Western India States Agency. (See Gazette of India, Part I-A, dated 31-10-42, p. 221 at p. 224, see also Gazette of India Part I-A dated 14-11-42 p. 250 at p. 254.)

By another Order called the Western India States Full Jurisdiction Railway Lands (Application of Laws) Orders 1942, this section is omitted from the application to the Railway Lands. (See Gazette of India Part IA dated 30-10-1942 p. 280.) By the Baroda Cantonment (Application of Laws) Order, 1943, this section is omitted from application to the Baroda Cantonment. (See Gazette of India, Part I-A, dated 14th August 1943, p. 107.)

Sub-sec. (1) (a) and (b)

This sub-section corresponds to sec. 2 of the Hindu Wills Act XXI of 1870. Schedule III referred to in this sub-section corresponds to sections 1, 3 and 6 of the same Act XXI of 1870. The Hindu Wills Act is wholly repealed.

Sub-sec. (1) (c) and Proviso

This sub-section is new and was added by Act XVIII of 1929. The same Act XVIII of 1929 repealed sub-section (2) which was as follows :—“The provisions of Section 63 shall apply to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina of on after the 1st day of January, 1927, to which those provisions are not applied by sub-section (1)”. This sub-section was added by Act XXXVII of 1926 which was repealed by Act XVIII of 1929. The effect of the repeal of that sub-section and the addition of sub-section(c) is that the whole of Part VI of the Act is made applicable to the wills of Hindus, Buddhists, Sikhs and Jains wherever executed on or after 1st January, 1927. Upto the 1st day of January, 1927 only sec. 63 of Part VI applied but from 1929 the whole of Part VI has been made applicable to the will of Hindus, etc.

The Proviso corresponds to sec. 3 of Hindu Wills Act.

Proviso.—Section 69 of the Act lays down that every will shall be revoked by marriage. This section is omitted in the under mentioned sections in Sch. III to the Act, but to remove all doubt this proviso expressly states that in cases of wills of Hindus, etc., marriage after the making of the will shall not operate as a revocation of the will or codicil. It is again made clear by the omission of the words “than by marriage” in section 70 in Schedule III (4). Accordingly an unprivileged will of a Hindu, etc., can only be revoked by the provisions laid down in section 70 except by marriage and these provisions are exhaustive(a).

Part VI is divided into 23 chapters comprising section 57 to 191 and they are made applicable to the wills of Hindus etc. subject to the modifications and restrictions specified in Schedule III. The sections of this Act made applicable subject to modifications and restrictions are:—

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 108, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 and 190.

The Restrictions and Modifications in application of foregoing sections are :—

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words “than by marriage or” shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words “son,” “sons,” “child,” and “children” shall be deemed to include an adopted child; and the word “grand children” shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and

the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

History on the Legislature of Hindu Wills.—Prior to the Hindu wills Act of 1870 the Indian Succession Act, 1865, did not apply to the wills of Hindus. A Hindu could make his will in writing or by word of mouth, *i.e.*, oral or nuncupative(b). If the will was in writing it did not require attestation. All that was necessary was to show that the instrument was in the nature of a testament that it was complete and fully expressed the intention of the testator(c). Such a will could also be revoked by parol(d).

Hindu Wills Act XXI of 1870.—In 1870 this Act was passed to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus. It applied to all the wills of Hindus executed on and after 1st September, 1870, within the territories subject to the Lieutenant Governor of Bengal, *i.e.*, the Provinces of Bengal, Bihar, Orissa, and Assam and in the towns of Madras and Bombay and to all wills and codicils made outside those territories and limits so far as relates to immoveable properties situate within those territories and limits. The effect of this Act was that wills of Hindus were required to be in writing and signed and attested and probate of such wills was requisite. The Hindu Wills Act has been repealed and re-enacted in sec 57 Clauses (a) and (b) which reproduce sec. 2 of the Hindu Wills Act and the Proviso reproduces sec. 3 of the said Act.

Probate and Administration Act XI of 1881.—In 1881 this Act was enacted to provide for the grant of probate of wills and letters of administration in cases to which the Indian Succession Act, 1865, did not apply. The Hindu Wills Act had only a limited application and there was no means of conferring on any one a representative title in the case of a deceased Hindu or Mahomedan. In the case of a Hindu or a Mahomedan dying intestate there was no enactment empowering the Courts to grant letters of administration. In *Luchman Bharti v. Dukharan*(e) it was held that the District Court had no power to entertain applications for probate or letters of administration in respect of wills of Hindus not governed by the Hindu Wills Act. The Probate and Administration Act conferred upon the District Court full jurisdiction to grant probate and letters of administration of wills made before 1st September, 1870, *viz.*, to wills of Hindus to which the Hindu Wills Act did not apply.

Before the passing of this Act the District Courts possessed powers to grant certificate under Act XXVII of 1860 which only conferred on the person obtaining it the authority to realize debts mentioned in the certificate, to receive dividends and interest on shares and securities and the negotiations of such securities. Act XXVII of 1860 was repealed by Act XXIV of 1867 except as to Hindus, Mahomedans, Buddhists and persons exempted under section 332 of the Indian Succession Act, 1865, and as regards Hindus, etc., it remained in force until the Succession Certificate Act VII of 1889 was passed.

Indian Succession Act, 1925.—This Act has amalgamated the Hindu Wills Act, the Probate and Administration Act and the Succession Certificate Act (See Schedule IX which was repealed by sec. 2 of the Act XII of 1927).

Indian Succession (Amendment) Act XXXVII of 1926.—Upto the passing of this Act only those wills of Hindus, Buddhists Sikhs and Jains which were governed by the Hindu Wills Act were required to be in writing and attested by two witnesses. This amending Act enacted that on and after the 1st day of

(b) *Hari Chintaman v. Moro Lakshman*, 11 Bom. 89. (d) *Maharajah Pertab Narayan v. Maharanee Subhao Kooer*, 3 Cal. 626 (P.C.).
(c) *Vinayak v. Govindrao*, 6 B. H. C. R. (A.C.) 224. (e) 6 C. L. R. 138.

January, 1927 the provisions of sec. 63 shall apply to wills and codicils made by any Hindu etc. Hence the wills of Hindus on and after 1st January, 1927 must be in writing and attested by two witnesses. This Act was repealed by Act XVIII of 1929.

Indian Succession (Amendment Act) XXI of 1928.—This Act amended Sec. 213 of the Indian Succession Act, 1925. The effect of the amending Act was that it excluded all wills falling under clause (2) of Sec. 57 from the operation of sec. 213, *i.e.*, all wills falling under cl. (2) of sec. 57 were not required to obtain probate. This Act was repealed by Act XXIII of 1929.

Indian Succession (Amendment) Act XVIII of 1929.—Secs. 3 and 4 of this Act amended Sec. 57 and sec. 213 of the Indian Succession Act as follows :—

3. (1) Sub-section (1) of section 5 of the said Act shall be renumbered as Amendment of section 57, and after clause (b) and before the proviso the section 57 Act word “and” and the following clause shall be added, XXXIX of 1925. namely :—

(e) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b)”.

(2) Sub-section (2) of section 57 of the said Act shall be omitted.

4. In sub-section (2) of section 213 of the said Act, for the word “class”

Amendment of the word “classes” and for the words and figures “sub-section section 213 Act (1) of section 57” the words, letters and figures “clause (a) and XXXIX of 1925. (b) of section 57” shall be substituted.

The effect of this enactment is that the whole of Schedule III of the Indian Succession Act is applied to all the wills of Hindus, Buddhists, Sikhs and Jains. Amongst the sections enumerated in Schedule III are sections 63, 70 and 71. Sec. 63 relates to the execution and attestation of wills. Sec. 70 relates to revocation of wills and sec. 71 relates to obliteration, interlineation and alterations of wills.

Conclusion.—The net result of all these legislative changes is as follows :—

(a) All wills of Hindus etc. made on and after 1st September, 1870, within the Provinces of Bengal, Bihar, Orissa and Assam and within the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay must be in writing and must be attested by two witnesses. Probate must be obtained of these wills, otherwise no right as executor or legatee can be established. (See sec. 213). The revocation of these wills must also be in accordance with sec. 70 except that marriage of the testator shall not revoke such a will. If there are any obliterations, interlineations or alterations in such wills they shall have no effect unless the requisitions of sec. 71 are complied with.

(b) All wills of Hindus etc. made outside the territories mentioned in (a) but so far as they relate to immoveable properties situate within these territories must also be similarly executed, attested, revoked or altered, etc. and they must also be proved and probate thereof obtained before any right as executor or legatee can be established.

(c) All wills made by Hindus etc. on and after 1st January, 1927, must be in writing and attested by two witnesses. They can be revoked only in the manner provided by sec. 70 except that marriage shall not revoke any such will. Any alterations, interlineations or obliterations in such wills must comply with the

requirements of sec. 71. These wills are not required to be proved and no probate is necessary if the will falls under clause (c) of sec. 57 as sec. 213 (2) only requires that no right as executor or legatee can be established without a probate when a will of a Hindu falls under clauses (a) and (b) of sec. 57 and not under clause (c)(f).

What property may be bequeathed by will by a Hindu

Sec. 57 (I) provides for certain restrictions specified in Schedule III on Hindus in making a testamentary disposition.

Restriction No. I

(1) The first restriction mentioned in Schedule III is, "Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos* or to deprive any person of any right of maintenance of which but for the application of these sections he could not deprive them by will." Hence a Hindu can bequeath whatever property he can alienate *inter vivos*. He may dispose of by will all his self acquired property. A Hindu governed by the Mitakshara law cannot by will bequeath his undivided share in the joint family property but if he is the sole surviving coparcener he can bequeath the joint family property by will. (See Mulla's Hindu Law, 9th Edn. p. 432).

A member of a Mitakshara family can bequeath his share in the joint family property after giving notice of partition to the other members(g).

A Hindu governed by Dayabhaga law can dispose of his self-acquired as well as ancestral property by will. (See Mulla's Hindu Law, 9th Edn. p. 432.)

But a Hindu cannot by will deprive his widow from a claim for maintenance,(h).

A Hindu female may dispose of her Stridhan by will. (See Mulla's Hindu Law, 9th Edn. p. 434).

Restriction No. II

The second restriction contained in Schedule III is "Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jain to create in property any interest which he could not have created before the 1st day of September, 1870." This is in accordance with the *Tagore Case*(i). According to the authority of that case and other authorities of the Privy Council a Hindu may create a life estate or successive life estates or any other estate for a limited period provided that the donee is a person capable of taking under the deed or will. But the English estate tail is an estate unknown to Hindu law and no one can succeed under a will as heir to such an estate. According to the decision in *Bai Dhanlaxmi v. Hariprasad*(j) a Hindu may create a life estate or successive life estates. But a series of absolute estate defeasible in succession on the happening of an uncertain event cannot be considered as a succession of life estate(k). According to Hindu law an estate cannot be held in abeyance(l).

Restriction No. III

The third restriction mentioned in Schedule III is "Nothing therein contained shall affect any law of adoption or intestate succession." A Hindu cannot by will alter the line of succession laid down by Hindu law. He cannot abrogate the rules of adoption laid down by Hindu law.

(f) *Janakibai v. Durga Prasad*, A. I. R. (1938) A. 640; (1938) A. L. J. 39.

(g) *Narayan Rao v. Purshothama*, (1938) Mad. 315.

(h) *Pramatha v. Nagendra*, 12 C. W. N. 808,

(i) 9 Beng. L. R. 377.

(j) 23 Bom. L. R. 433; 45 Bom. 1038.

(k) *Ambalal v. Ambalal* 34 Bom. L. R. 1501.

(l) *Gordhandas v. Ramcoover* 26 Bom. 449; 3 Bom. L. R. 857,

Restriction No. IV (Proviso)

In applying sec. 70 the words "than by marriage" shall be omitted.

58. (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.

General applica-
tion of Part.

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession.

Sub-sec. (1)

Mohammadans.—The whole of Part VI comprising sections 57 to 191 does not apply to wills of Mahommadans.

This section is in part a reproduction of sections 331 and 2 of the Act X of 1865. Having made applications of certain sections of Part VI of this Act to the wills made by Hindus, etc., this section excludes the following wills. -

(a) Wills of Muhammadans. Even by the Act of 1865 the law relating to testaments was not applied to the Mahomedans as they have their own system of laws. A Mahomedan can make a will in any form. It may be oral or written. If it is in writing it need not be attested(m). A will of a Mahomedan also does not require probate to be taken(n).

(b) All wills of Hindus, etc., executed before 1st January, 1866.

(c) All wills of Hindus, etc., not governed by the Hindu Wills Act, executed before 1st January, 1927.

Sub-sec. (2)

Except as aforesaid Part VI constitutes the law of testamentary succession applicable to all the wills in British India except any other law for the time being in force.

By Notification published in the Gazette of India Part IA, dated 16th September, 1939 at p. 171 as regards the Punjab State Railway lands the words "Save as provided in sub-section 1" are omitted. (See also Gazette of India Part IA, d. 14-11-42, p. 251 at p. 254). By the Western India Administration Order, 1942 published in the Gazette of India Part I A, d. 31-10-42 at p. 221 the words "save as provided by sec. 57" in sub-sec. 1 are omitted.

CHAPTER II.**Of Wills and Codicils.**

59. Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

(m) *Aulia Bibi v. Ala-ud-din*, 28 All. 715.

(n) *Shaik Moosa v. Shaik Essa*, 8 Bom 241.

Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

(*This is sec. 46 of the Succession Act X of 1865 except that in Explanation (4) the word "intoxication" is substituted for the word "drunkenness."*)

General.—It has been a firm principle of English law and one that is peculiar to English law that a man may dispose of his own as he wishes whether by his own act during his life or as from the date of his death by will. At one time even in England a man could only dispose of one-third of his property, other than land, by will, and it was not until the reign of Henry VIII that a will of land became legal. It has been said that England is the only civilized country where a man can, in making his will, ignore the natural claims of his wife and children and leave his property to create an endowment for a college or a cat.

The Inheritance (Family Provision) Act, (1938) (1 & 2 Geo. 6 c 45) has been enacted to provide a remedy for the evil of an unnatural will—a testator deliberately disposing of his property by will in such a manner as to leave his wife and children unprovided for in spite of his ability adequately to provide for them. It is the unjust will that is aimed at by the statute and not the neglect to make a will.

By sec. 1 of this Act it is provided that if a person dies domiciled in England leaving—

- (a) a wife or husband;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
- (c) an infant son; or
- (d) a son, who is, by reason of some mental or physical disability, incapable of maintaining himself;

and leaving a will, then, if the Court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in the Act referred to as "dependant" of the testator) is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the Court may order that such reasonable provision, as the Court thinks fit, shall, subject to such conditions or restrictions, if any, as the Court may impose be made out of the testator's net estate for the maintenance of that dependant; and by sec. 8 it is provided that the amount of maintenance shall not be more than two-thirds of the annual income which may be made applicable for the maintenance of the testator's dependants—

- (a) if the testator leaves both a wife or husband and one or more other dependants ; or
- (b) if the testator does not leave a wife or husband, or leaves a wife or husband and no other dependants one-half of the annual income.

Such payment of maintenance shall cease

- (a) in case of a wife or husband on her or his remarriage;
- (b) in case of a daughter, who has not been married, or who is under disability, her marriage, or the cesser of her disability, whichever is the later,
- (c) in case of an infant son, his attaining the age of 21 years;
- (d) in case of a son under disability, the cesser of his disability, or in any case, his or her earlier death.

Persons Capable of Making Wills.—

(1) Every person of *sound mind* and not a minor may dispose of his property by will. Generally speaking, therefore, all persons who have sufficient discretion and free will are capable of disposing of their property by will. There are two grounds of incapacity : (a) the want of sufficient legal discretion ; (b) the want of liberty or free-will. (Williams on Executors, 12th Edn., p. 8.)

Sound and Disposing Mind.—It is essential for the validity of a will that the testator should be of sound mind, memory and understanding which mean “sound and disposing mind”. A sound and disposing mind connotes that the testator must be conscious of the various claims persons have upon his property and must also be capable of realising the extent of the property disposed of under the will. It is essential that the testator should at the time he signs the will be mentally competent to understand both these things. Where the mind has been too much enfeebled by the illness or old age and infirmity arising from the approach of death, the protection of law is more needed and strong proof is required that the contents of the will were known to the testator and that it was his spontaneous act, (Jarman on Wills, 7th Edn, p. 54) more specially where one object is forced to the attention of the invalid testator as to shut out all others requiring consideration (o). “In order to constitute a sound and disposing mind,” said Erskine, J., in *Harwood v. Baker*(p), “a testator must not only be able to understand that he is by his will giving the whole of his property to an object of his regard but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property and the protection of the law is in no case more needed than in those where the mind has been too much enfeebled to comprehend more objects than one.” Mere ability to sign one’s name, nor mere consciousness, nor the fact that the testator was able to maintain ordinary conversation and to answer familiar and easy questions is enough to constitute a sound and disposing mind(q). The testator must be capable of disposing of his property with understanding and reason(r). He must be able to appreciate his property and to form a judgment with respect to the parties whom he chooses to benefit by it after his death(s). The question of sound and disposing mind is a question of fact and of degree of mental capacity in each case. If a testator while in a state of health gives instructions for a will and it is prepared in accordance with those instructions, a very slight mental capacity for execution of the will

(o) *Brajeswari v. Rasik Chandra*, A. I. R. (1925) C. 739. (r) *Musstt. Padma v. Dharma Das*, 15 C. W. N. 728.
 (p) 3 Moo. P. C. 282 at 290. (s) *Surrendra Krishna v. Sm. Ranee Dassee*, 24 C. W. N. 860.
 (q) *Surendra v. Rani Dassi*, 47 Cal. 1043; *Sustl Kumar v. Apsari*, 19 C. W. N. 826.

would be sufficient(*t*). Mental weakness to constitute testamentary incapacity must be *qua* the will itself(*u*). On the other hand if the testator is proved to be of a weak mind and the instrument is of a complicated nature a very heavy onus will lie on the party propounding the will to prove that the testator possessed a sound and disposing mind. In ordinary cases execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will(*v*). For further treatment of this subject see "Onus Probandi" and "Lunatic".

(2) **Aliens.**—Aliens, whether friends or enemies, if not disqualified from mental incapacity or minority, may dispose of property by will (*w*). In England formerly alien friends or aliens whose countries were at peace with England might make wills of their personal property; as to land they were incapable of holding it and so of devising it; but alien enemies were incapable of making wills unless they had the King's licence. Now by the English Naturalization Act of 1870, real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner as if he was a natural born British subject. (see British Nationality and status of Aliens Act 1914)

(3) **Traitors and Felons.**—Formerly traitors and felons were, according to English law, incapable of making wills, for all their goods and chattels were forfeited to the King. Since the abolition of the forfeiture of lands and goods for treason and felony in England traitors and felons are now capable of making wills.

(4) **Felo de Se.**—Formerly he was incapable of devising goods and chattels; but he could devise his lands. Now he is no longer incapable.

(5) **Hindus.**—This section applies to Hindus, see Schedule III. The idea of a will was wholly unknown to pure Hindu law; but the Case law and the Acts of the Legislature have given to Hindus a limited right to dispose of their property by will (*x*). A Hindu can by will, dispose of his separate or self-acquired property to any one he likes subject, however, to his widow's claim for maintenance (*y*). A Hindu governed by the Mitakshara law cannot make a will of the ancestral or joint family property or of his undivided share therein whether he be a father, or a manager, or a coparcener (*z*). He can, however, do so, if he first gives notice of his intention to become divided and then execute a will disposing of his share in the joint family property (*a*). He can also make a will of the joint family property, if no other person is interested therein except himself and such a will is not revoked by the birth, subsequent to the execution of the will, of a son who died before the testator(*b*). But a father and son being joint, the consent of the son cannot validate his father's will to the extent of his father's undivided share in the joint family property (*c*).

According to the Dayabhaga law prevailing in the Bengal Presidency a father may dispose of his ancestral property and a coparcener may dispose of by will the whole of his interest in the joint family property.

A Hindu female may bequeath her *stridhana* subject, in certain cases, with the consent of her husband.

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| <p>(<i>t</i>) <i>Harwood v. Baker</i>, <i>supra</i>; <i>Parker v. Felgeti</i>, 1883, P. D. 177; <i>Perera v. Perera</i>, 1901 A. C. 354; <i>Kusum Kumari v. Satish Chandra</i>, 18 C. W. N. 1128; <i>Jarat Kumari v. Bissessur Dutt</i>, 39 Cal. 245 at 256; <i>Nawalmal v. Dhanu Manchand</i>, 5 Bom. L. R. 327; <i>Bhagirathibai v. Vishwanath</i>, 7 Bom. L. R. 92.</p> <p>(<i>u</i>) <i>Nabagopal v. Sarala</i>, A. I. R. 1933 C. 574.</p> <p>(<i>v</i>) <i>Woomesh Chunder v. Rashmohini Dassi</i>, 21 Cal. 179; 25 I. A. 119.</p> <p>(<i>w</i>) <i>Mayor of Lyons v. East India Co.</i> 1 Moore's P. C. 175.</p> | <p>(<i>x</i>) <i>Beer Pertab v. Rajendra Pertab</i>, 12 M. I. A. 1.</p> <p>(<i>y</i>) <i>Krishnarao v. Bhagawantrao</i>, 2 Bom. L. R. 1082; see also <i>Purendra v. Hemangini</i>, 36 Cal. 75.</p> <p>(<i>z</i>) <i>Lakshmishankar v. Vajjanath</i>, 6 Bom. 25; <i>Harilal v. Bai Mani</i>, 29 Bom. 851.</p> <p>(<i>a</i>) <i>Narayan Rao v. Purushottama Rao</i>, (1938) Mad. 315.</p> <p>(<i>b</i>) <i>Bodi v. Venkataswami</i>, 38 Mad. 369.</p> <p>(<i>c</i>) <i>Bhikhabhai v. Purshottam</i>, 50 Bom. 558.</p> |
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A Hindu wife who has lived separate from her husband can by will dispose of the property inherited from her father without the consent of her husband (*d*).

A Hindu minor cannot make a will during minority (*e*).

A Hindu cannot by will institute a course of succession which is unknown to Hindu law, *c.g.*, an estate tail (*f*).

(6) **Mahomedans.**—Mahomedans are not governed by this Act at all ; but under the Mahomedan law every Mahomedan of sound mind and not a minor may make a will. A Mahomedan, however, cannot by will dispose of more than one-third of his estate after payment of debts unless the heirs consent to the bequest after the testator's death. Also a Mahomedan cannot bequeath anything to an heir and the bequest to an heir will be invalid unless the other heirs consent after the testator's death. A Mahomedan can make an oral will.

A Mahomedan will is not required to be probated. But there is nothing in this Act to preclude the Court from granting probate of a Mahomedan will. In such a case it is not the function of the Probate Court to see whether the will purports to dispose of only one-third of the property. The will may be admitted to probate although it may purport to deal with more than one-third share (*g*).

(7) **Khojas** :—In matters of succession and inheritance a Khoja is governed by Hindu law. A Khoja can dispose of by will the whole of his property and his right to make the will is not confined to one-third of the property as under Mahomedan law (*h*).

Construction of the will of Khojas :—In *Sallay Mahomed v. Lady Janbai* (*i*) it was observed that the will of a Khoja should be construed according to Hindu law. In a recent case of the Bombay High Court (*Ashrafalli v. Mahomedalli* being suit No. 951 of 1941) Mr. Justice Chagla who delivered judgment on 20th August 1945 held that the will of a Khoja must be construed according to Hindu law ; but that having regard to the provisions of the Shariat Act XXIV of 1937 if a Khoja creates a trust by his will that trust should be construed according to Mahomedan law. His Lordship laid stress on the words “ trusts and trust properties and Wakfs ” occurring in sec. 2 of the Act and on the same words not occurring in sec. 8 of the Act and from that concluded that the customary law and usage, namely Hindu law, did not apply to Khojas so far as concerned any trusts or Wakfs created by their wills and his Lordship pointed out that the word “ trusts ” and “ Wakfs ” were generic terms which included trusts or wakfs made by any testamentary writing as well as any non-testamentary writing.

But it must be valid that so far as the making of the will or its form or its revocation is concerned a Khoja is governed by Mahomedan law and not by Hindu law.

(8) **Cutchi Memons** :—Before the passing of the Cutchi Memons Act XLVI of 1920 a Cutchi Memon was governed by Hindu law in matters of succession and inheritance. He had full testamentary capacity and could dispose of the whole of his property in any manner he liked. In *Advocate-General v. Jimbaba* (*j*) it was held that Cutchi Memons had acquired by custom the power of disposing of the whole of their property by will. Probate was granted of a nuncupative will of a Cutchi Memon (*k*) An unattested will of a Cutchi was held valid (*l*).

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| (d) <i>Bhagavanlal v. Bai Divali</i> , 27 Bom. L. R. 633. | L. R. 397 ; <i>Advocate-General v. Karmali</i> , 29 Bom. 133. |
| (e) <i>Hardwari v. Gomi</i> , 33 All. 525 ; <i>Bai Gulab v. Thakorelal</i> , 36 Bom. 622. | (i) 3 Bom. L. R. 785. |
| (f) <i>Tagore v. Tagore</i> , 9 B. L. R. 377, I. A. Sup. Vol. 47 ; <i>Sir Mangaldas Nathubhoy v. Krishnabai</i> , 6 Bom. 38. | (j) 41 Bom. 181. |
| (g) <i>Abdul v. Dr. Syed Minhazal</i> , (1939) Nag. 413. | (k) In the will of <i>Haji Mahomed Abba</i> , 24 Bom. 8. |
| (h) <i>Fidahusseini v. Bai Monghibai</i> , 38 Bom. | (l) <i>Re Aba Satar Haji Aboobaker</i> , 7 Bom. L. R. 558 ; <i>Sarabai v. Mahomed Cassum</i> , 43 Bom. 641. |

By the Cutchi Memons Act, 1920, a Cutchi Memon was given the power to make a declaration in the prescribed form and on that declaration being made he himself and all his minor children and their descendants would be governed in matters of succession and inheritance by Mahomedan law.

In 1937 the Legislature passed another Act known as the Sheriat Act (Act XXVI of 1939). This Act was made applicable to all Muslims in British India. Sec. 2 of the Act is as follows:—Notwithstanding any custom or usage to the contrary, in all questions regarding *intestate* succession and other questions which are mentioned in the section, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Sheriat). Sec. 3 of the Act authorises any Muslim by a declaration to be made as prescribed in that section to have Muslim law applied to him and to all his minor children and their descendants even in matters relating to adoption, wills and legacies. Therefore on the passing of the Sheriat Act, even if a Cutchi Memon had not made a declaration under the Cutchi Memons Act, he was to be governed by Mahomedan law in all matters relating to intestate succession. He would also be governed by Mahomedan law in questions of testamentary succession provided he made a declaration under sec. 3 of the Sheriat Act.

A further Act was passed in 1938 being Cutchi Memons Act X of 1938 applicable to all Cutchi Memons. Sec. 2 provides that subject to the provisions of sec. 3 all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Mahomedan law. By sec. 4 the Cutchi Memons Act XLVI is repealed. Sec. 3 saves the right already acquired.

Construction of the Will of a Cutchi Memon :—In *Adv. General of Bombay v. Jimbabei (m)* Beaman, J., held that Cutchi Memons had acquired by custom the right of disposing of the whole of the property by will, but he considered that a Cutchi Memon's will should be construed by reference to Mahomedan law. The latter part of this opinion has not found acceptance in the later cases. In *Abdul Sakur v. Abubakar (n)* Mirza, J., strongly criticised the judgment of Beaman, J., and refused to follow it holding that the opinion was obiter. He was of opinion that a Cutchi Memon's will should be construed according to Hindu law. In *Adambhai v. Allarakhia (o)* the opinion of Mirza, J., was accepted. The Madras High Court also held that the Cutchi Memons were governed by Hindu law (p), and the same court in *Abdul Sattar v. Abdul Hamid (q)* held that a Cutchi Memon who had died in 1934 leaving a will was governed by Hindu law of inheritance and succession and had full testamentary power to dispose of his property and that the will must be construed according to Hindu law except in so far as it operated to create a wakf. But it must be remembered that after the passing of the Cutchi Memon Act of 1938 as all the Cutchi Memons who die after the date of the passing of that Act are in matters of succession and inheritance governed by Mahomedan law their wills must be construed and looked upon from the point of view of Mahomedan law (r).

Persons incapable of Making Wills.—

Minors.

(1) **Infants** or persons who have not completed the age of 18 years (or 21 years where there is a guardian) are not capable of making wills (s). In England the age limit is 21. Wills made by such persons during minority shall be null and

(m) 41 Bom. 181.

(n) 54 Bom. 358 ; 37 Bom. L. R. 686.

(o) 37 Bom. L. R. 686.

(p) *Sidick Haji v. Ebrahim Haji*, 31 M. L. T. 188.

(q) (1945) Mad. 276.

(r) *Bayabai v. Bayabai*, 44 Bom. L. R. 792.

(s) *Vijayarajnam v. Sudarsana*, 27 Bom. L. R. 1082 (P. C.); 48 Mad. 614 (P. C.); *Gulab v. Thakerlal*, 27 Bom. L. R. 1082.

void, though the person may have died after attaining majority (*t*). The Indian Majority Act of 1875 applies to all persons including Hindus and Mahomedans so far as the competency to make a will is concerned. The Act repeals the rules of Hindu and Mahomedan law and therefore a Hindu minor who has not completed the age of 18 years is not capable of making a will (*u*). The age of majority for the purpose of making a will is determined by the Indian Majority Act (*v*). If a guardian of the minor has been appointed before the minor has attained 18 years, such a minor cannot be said to have attained his majority so as to have become capable of making will until he has completed the age of 21 years (*w*). But if on an application for the appointment of guardian a conditional order is made appointing guardian of the minor on his furnishing security and if the security is not furnished and the order is vacated, the minor is deemed to have attained majority at 18 and the will made after attaining 18 but before the completion of the age of 21 is a valid will (*x*). A Hindu minor is not competent to make a will conferring authority on his wife to adopt (*y*). A recital in the will mentioning the age of the testator at the time of its execution is admissible to prove the testator's age under section 32 of the Indian Evidence Act (*z*). But a father whatever his age may be can make a will appointing guardian of his children, (see section 60).

(2) A ward under the Court of Wards Act (III of 1899, sec. 38) is incompetent to dispose of his property by will without the consent of the Court of Wards (*a*).

Explanation I

Married Woman.

A married woman is capable of disposing by will of any property which she could alienate during her life. As there may arise cases of women married before the year 1865 who would not in consequence be capable of making wills, as the Act does not apply to them, it would be interesting to know what were the restrictions placed on them as regards their testamentary capacity. They would be governed by the Common Law which prevailed in England before the passing of the Married Women's Property Acts, and the law was shortly as follows:—A married woman was utterly incapable of devising *lands*. She was also incapable of making a testament of *chattels* without the license of her husband, for all her personal chattels were absolutely her husband's. Her power to dispose of her real and personal estate by will was practically limited to the disposing of property given or settled to her separate use or to the execution of a power of appointment.

As regards Hindu married women, although this section applies to them their capacity to make will is restricted by Schedule III, Clause 1. By the Married Women's Property Act, III of 1874, the wages and earnings of a married woman are declared to be her separate property but that Act also does not apply to Hindus.

The effect of this Explanation is to declare that a married woman can dispose of by will any property which she can alienate by her own act during her life without any consent of her husband.

Explanation II

Deaf, Dumb and Blind.

This Explanation refers to the case of persons who are deaf *or* dumb *or* blind. The explanation omits the case of a person who is deaf *and* dumb *and* blind who

(*t*) *Hardwari v. Gomi*, 38 All. 525.

(*u*) *Bai Gulab v. Thakorelal*, 36 Bom. 622.

(*v*) *Krishnamachariar v. Krishnamachariar*, 38 Mad. 166.

(*w*) *Hardwari v. Gomi*, 33 All. 525 at 527.

(*x*) *Jaysing v. Pratapsing*, (1945) Bom. 449.

(*y*) *Kondapalli v. Mandapaka*, 52 I. A. 305.

(*z*) *Krishnamachariar v. Krishnamachariar*, 38 Mad. 166.

(*a*) *Dwarka Nath v. Raj Rani*, 39 Bom. L. R. 939 (P. C.).

is held incapable of making a will.

One who is deaf and dumb from birth is presumed to be an idiot and, therefore, incapable of making a will, but the presumption may be rebutted by producing evidence of lucid intervals. This Explanation makes it clear that such a person can make a will if he is able to know what he does by it. Mere blindness will not incapacitate a person from making a will provided he is able to know what he does. It will, therefore, be sufficient if there is satisfactory proof of the knowledge and approval of the will by the blind man.

Explanation III

Lunatics and Insane Persons.

Under the Indian Trustees Act XXVII of 1866, section 2, a lunatic means any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs, and a "person of unsound mind" means any person not a minor who, not having been found to be a lunatic, shall be incapable, from infirmity of mind to manage his own affairs. Under the Indian Lunacy Act, IV of 1912, lunatic means an idiot or person of unsound mind. According to the Indian Contract Act, IX of 1872, section 17, a person is said to be of sound mind if at the time he makes a contract he is capable of understanding it and of forming a rational judgment as to its effects.

A lunatic is a person usually mad but having intervals of reason (*b*). Such a person cannot make a will during his insanity. Lunacy or insanity is classified by medical jurists under four forms—mania, monomania, dementia, and idiocy. Mania is the common form of insanity, its characteristics being that the ideas flow without any order or connection, the person having absolutely no control over his thoughts; in monomania the disorder is confined to one subject or to one class of subjects; it is also called partial insanity; in dementia there is total absence of reasoning power; idiocy is congenital; an idiot is a fool or a mad man from his birth who never has any lucid interval.

If a person whilst he is of sound mind makes a will and subsequently becomes insane the will is not revoked by subsequent insanity. This Explanation enacts that a lunatic may make a will during a lucid interval.

The will of an eccentric man is not to be put on the same footing as the will of a lunatic. There is a distinction between insanity and eccentricity but it is impossible to draw a line between eccentricity and insanity. Mere eccentricity unaccompanied by any other mental derangement will not prevent a person from disposing of his property by will (*c*), unless it is associated with some sort of delusion (*d*).

Delirium and Insanity.—Delirium is a fluctuating state of mind created by temporary excitement in the absence of which the patient is most commonly really sane and the difficulty of proving a lucid interval is less. In order to constitute insane delusion it must be shown that the testator's belief in it was unfounded but that it was so destitute of foundation that no one except an insane person would have entertained it (*e*). In the leading case of *Dew v. Clarke* (*f*), the testator had an insane aversion to his daughter and labouring under that delusion he willed away his property to a stranger. It was held that the will was bad. But the mere existence of a delusion or a partial unsoundness of mind, not affecting the general faculties and not affecting the mind of the testator in regard to testamentary

(*b*) *In re Cowasji Beramji*, 7 Bom. 15.

(1939) C. 379.

(*c*) *Morgan v. Boys*, 1 Tayl. Med. Jur. 907.

(*e*) *Sajid Ali v. Ibad Ali*, 22 I. A. 171.

(*d*) *Swadhami v. Raja Jagat Kishore*, A. I. R.

(*f*) 3 Add. 79.

disposition, will not be sufficient to deprive a person of the power of disposing of his property (*g*). The result is that a person subject to delusions may make a valid will, if the delusions under which he labours be such that they could not be supposed to have affected the dispositions made by the will. (Williams on Executors, 12th Edn., pp. 13-29).

Lucid Interval.—It is an interval during which there is entire absence of the malady and the interval must be substantial, though it may be temporary (*h*). In such cases the order of proof and of presumption is reversed, *i.e.*, if the man is habitually insane, the proof of lucid interval will be on the party alleging the same. A great degree of caution is necessary to be observed in examining the proof of lucid interval. The Court must be satisfied not only that there was a complete and substantial recovery but that the recovery was of sufficient duration for the performance of the act (*i*). In cases of permanent proper insanity the proof of a lucid interval is a matter of extreme difficulty but in cases of delirium the probabilities in favour of lucid interval are infinitely stronger. Cases of partial insanity are not infrequent. It is called insanity *quod hoc* upon a particular subject or *quod ham* as to a particular person. In the case of *Dew v. Clarke* (*j*), the testator had an insane aversion for his daughter and the will was held to be null and void. The proof in this case required was not the proof of harsh treatment, no display of unkind feelings but the daughter was required to make out a case of antipathy resolvable into mental perversion. See *Waring v. Waring* (*k*) on the subject of partial insanity.

In cases of inofficious testaments, *i.e.*, when a testator gives away his property to strangers forgetting his natural duty to his children, there is no presumption of insanity, but it may throw somelight upon the question of the testator's capacity, (Halsbury's Laws of England, Vol. 34, p. 38). The Court always looks upon such a will with grave suspicion, more especially when such a will is produced after a lapse of many years (*l*).

Onus of Proof and Evidence.

Generally speaking every person is presumed to be sane until he is proved to be insane. Whenever, therefore, a will is produced which on the face of it is validly executed, the Court will presume that the testator was sane (*m*). The presumption of sanity is a mixed presumption of law and fact. In probate suits the ultimate burden of proving testamentary capacity rests on the party propounding the will. If any party alleges that the testator was insane then it will lie on the party propounding the will to prove affirmatively that the testator was of sound mind at the date of the execution of the will and that he knew and understood and approved of its contents (*n*). The burden always lies first on the party propounding the will to satisfy the conscience of the Court that the testator at the time he executed the will was of sound and disposing state of mind (*o*). This burden becomes heavier when the testator is a man of advanced years and in an extremely feeble state of health, (*p*). If this burden is discharged then it is for the caveator who impugnes a will on the ground that it was obtained by the exercise of undue

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| (<i>g</i>) <i>Broughton v. Knight</i> , L. R. 3 P. and D. 64; | (<i>n</i>) <i>Balkrishna v. Gopikabai</i> , 7 Bom. L. R. 175. |
| <i>Banks v. Goodfellow</i> , L. R. 5 Q. B. 549. | |
| (<i>h</i>) <i>Cartwright v. Cartwright</i> , 1 Phillim. Rep. 100. | (<i>o</i>) <i>Lila v. Bijoy Protap</i> , 41 C. L. J. 300; |
| (<i>i</i>) <i>Hall v. Warren</i> , 9 Ves. 611. | <i>Musst. Padma v. Dharma Das</i> , 15 C. W. N. 728 ; |
| (<i>j</i>) 1 Add. 879. | <i>Bai Kuntha v. Prasannamoya</i> , 27 C. W. N. 797 ; |
| (<i>k</i>) 6 Moo. P. C. 341. | <i>Esoof v. Esmail</i> , A. I. R. (1938) R. 322. |
| (<i>l</i>) <i>Mussanmat Biro v. Atma Ram</i> , 64 I. A. 92. | (<i>p</i>) <i>Arthur v. Mrs. Maud</i> , A. I. R. (1938) A. 201. |
| (<i>m</i>) <i>Ganpatrao v. Vasantrao</i> , 34 Bom. L. R. 1371. | |

influence, excessive persuasion or moral coercion to make out his case (q). If the age of the testator is challenged, the onus of proving that the testator was not a minor at the time of the execution of the will also rests on the person propounding the will (r). It will then lie on the other party to prove that the testator was insane or was a minor. If the latter party adduces sufficient proof that the testator was habitually insane, the will will be bad, unless the other party can show that the will was executed during a lucid interval. If the testator was habitually insane, proof that the will was executed during a lucid interval will be a matter of extreme difficulty, as it will have to be proved by very clear and satisfactory evidence. If, however, the testator is affected by temporary insanity proof of a lucid interval will not be so very difficult, e.g., the case of persons affected with insane delusions. "The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the will. and if it can be proved and established that it is a rational act, rationally done, the whole case is proved" (s). It is not necessary to prove that the testator was sane for a day, an hour, or a minute, the length of a lucid interval is immaterial provided the making of the will is the act of a rational being, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time (t). It is also not necessary that the testator should have been in perfect good health and that his mind should have been so clear as to enable him to give complicated instructions for his will. It is sufficient if when the will was read out to him and explained to him he was capable of understanding (u).

If the insanity of the testator before the date of the will is once established the burden of proof that it was made during a lucid interval lies on the person propounding the will. If, however, it is not established, or habitual insanity does not exist, the burden of proving actual insanity at the date of the execution of the will shifts to the person impeaching the will (v).

The presumption of sanity is a mixed presumption of law and fact. According to the English practice when in a probate action if a party pleads that the testator was not of sound memory and understanding, particulars of any specific instances of delusion must be delivered before the case is set down for trial, and, except by leave of Court or a Judge no evidence shall be given of any other instances at the trial (see, G, 19 R. 25 (a) Yearly Practice). This rule has the effect of overruling the decision in *Salisbury v. Nugent* (w). This rule has been referred to by Davar, J., in *Vatchagandhy will case*, *Vatchagandhy v. Vatchagandhy* judgment, delivered on 22nd July 1910, Bombay High Court.

The standard of proof to establish a will required by the Act is that of the prudent man and not an absolute or conclusive one (x). "A will is one of the most solemn documents known to law. By it a dead man entrusts to the living the carrying out of his wishes and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was made, it is essential that trustworthy and effectual evidence should be given to establish the will and in case of dispute or doubt the best evidence procurable should be furnished" (y). In ordinary cases execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will (z).

(q) *Motibai v. Jamsetji*, 26 Bom. L. R. 579.

(r) *Rajindra v. Ramjowai*, 5 Lah. 268; *Krishnamachariar v. Krishnamachariar*, 38 Mad. 166.

(s) *Cartwright v. Cartwright*, 1 Phillim 122.

(t) *Harwood v. Baker*, 3 Moo. P. C. 282.

(u) *Gordhandas v. Bai Suraj*, 23 Bom. L. R. 1068.

(v) *Ganpatrao v. Vasantrao*, 84 Bom. L. R.

1371.

(w) 9 P. D. 23.

(x) *Jarat Kumari v. Bissessur*, 39 Cal. 245; *Prasannamayi v. Baikuntha*, 49 Cal. 182.

(y) *Ram Gopal v. Aipna*, 49 I. A. 413 at p. 417.

(z) *Woomesh Chunder v. Rashmohini*, 21 Cal. 279, in appeal *Rashmohini v. Umesh Chunder*, 25 Cal. 824; 25 I. A. 169.

As regards proof of sound mind the person who propounds the will must prove that the testator did know and approve of the contents of the will and that he was of sound and disposing mind(*a*). When the testator's sanity is disputed the burden lies upon the person propounding the will to prove that the testator was of sound mind and that he knew and approved the contents of the will(*b*). Proof of consciousness alone is not enough(*c*). This burden is satisfied *prima facie* in the case of a competent testator by proving that he executed it from which the knowledge of and assent to the contents of the instrument are presumed(*d*). When a will challenged is in every respect a natural will and in accord with the feelings and tenor of life of the testator and its execution is satisfactorily proved the presumption is in favour of its being maintained and it is not in accordance with sound rules of construction to apply to such a will those canons which demand a rigorous scrutiny of documents(*e*). It does not lie in the mouth of any party to say that the testator ought not to have made such a will(*f*). But if those who oppose it succeed by a cross examination of the witnesses or otherwise in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question, before it can be admitted to probate(*g*). If a party impeaches the validity of the will on account of the supposed incapacity of mind in the testator, it will be on such party to establish such incapacity, (Williams on Executors, 12th Edn., pp. 15-16)(*h*). Where the capacity of the testator is proved to be doubtful or where the testator is proved to be blind or illiterate there must be proof of instruction or of reading over or other satisfactory evidence of some kind that he knew and approved of the contents of the will(*i*), and this rule is especially applicable where the instrument is inofficious, *i.e.*, not consonant to the testator's natural affections and moral duties or where it is obtained by a party materially benefited(*j*). When the evidence is conflicting it is the duty of the Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it(*k*).

In all such cases, if the evidence is conflicting, it is the duty of the Court of Appeal to have great regard to the opinion of the trial Judge(*l*).

As regards proof of signature of the testator the best evidence available, *viz.*, the evidence of the attesting witnesses should be given and any evidence of a general nature to the effect that the signature appears to be genuine is of little worth(*m*). But the mere fact that the attesting witnesses have repudiated their signature does not invalidate the will, if it can be proved by evidence of a reliable character(*n*). If the evidence as to due execution is strong and satisfactory, to outweigh it, it would be necessary to prove the improbability to be cogent and clearly made out(*o*).

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| <p>(a) <i>Nawalmal v. Dhanu</i>, 5 Bom. L. R. 327; <i>Bhagirathibai v. Vishwanath</i>, 7 Bom. L. R. 92.</p> <p>(b) <i>Ganpatrao v. Vasantrao</i>, 34 Bom. L. R. 1871.</p> <p>(c) <i>Kuppayammal v. Ammani</i>, 22 Mad. 345.</p> <p>(d) <i>Shunmugaroya v. Manikka</i>, 32 Mad. 400, 36 I. A. 185.</p> <p>(e) <i>Jagrani v. Kuar Durga</i>, 18 C. W. N. 521 (P. C.), 41 I. A. 76; see also <i>Chotey Narain v. Ratan Koer</i>, 22 Cal. 519; <i>Dulhin Genda v. Harnandan</i>, 20 C. W. N. 617.</p> <p>(f) <i>Suna Ana v. Ramaswami</i>, 18 Bom. L. R. 408 (P. C.).</p> <p>(g) <i>Cleare v. Cleare</i>, L. R. 1 P. and D. 655; <i>Hormasji v. Dhanjisham</i>, 12 Bom. L. R. 569; <i>Balkrishna v. Gopikabai</i>, 7 Bom. L. R. 175.</p> | <p>(h) <i>Shama Churn v. Khetromoni</i>, 27 I. A. 10; <i>Sukh Dei v. Kedar Nath</i>, 28 I. A. 186; <i>Bndeshri v. Mussamat Baisakh</i>, 24 C. W. N. 674 (P. C.); <i>Balkrishna v. Gopikabai</i>, 7 Bom. L. R. 175.</p> <p>(i) <i>Woomesh Chunder v. Rashmohini</i>, 21 Cal. 279 in appeal <i>Rash Mohini v. Umesh Chunder</i>, 25 Cal. 824 (P. C.).</p> <p>(j) <i>Brogden v. Brown</i>, 2 Add. 449; <i>Sankey v. Lilley</i>, 1 Curt. 402.</p> <p>(k) <i>Rashmohini v. Umesh Chundra</i>, 25 I. A. 109.</p> <p>(l) <i>Shunmugaroya v. Manikka</i>, 36 I. A. 185.</p> <p>(m) <i>Ram Gopal v. Atpna</i>, 49 I. A. 413; <i>Prasannaamay v. Baikuntha</i>, 49 Cal. 132.</p> <p>(n) <i>Brahmadat v. Chaudan Bibi</i>, 20 C. W. N. 192.</p> <p>(o) <i>Chotey Narain v. Ratan Koer</i>, 22 Cal. 519 (P. C.).</p> |
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. Explanation IV

Intoxication, Illness, Infirmary or Any other Cause

Drunkenness.—A will made by a person when he is so excessively drunk that he is utterly deprived of the use of reason and understanding is null and void. It is called *delirium tremens*. But a person who is habitually addicted to drink but is not insane or deranged may make a valid will.

Illness.—Illness which impairs the mind of a person in such a manner as to deprive him of the power of understanding the nature of the instrument or the effect of its provision will invalidate the will. (See *ill. ii*). But mere debility unaccompanied by any mental incapacity will not deprive a person from making a will. (See *ill. iii*)(p).

Infirmary and Old Age.—Infirmary is of two kinds, physical and mental, and wills made during those infirmities are looked upon with suspicion. Physical infirmary results from old age or severe illness. Mere old age does not deprive a man of the capacity of making a will. Yet if a man in his old-age becomes a very child again in his understanding or by reason of extreme old age or other infirmary he becomes so forgetful that he does not know his own name, he is not fit to make a will. Extreme old age, however, tends to excite the jealousy and vigilance of the Court(q). Wills are too frequently made by the sick and the dying. In such cases it is not enough to show that the testator was able to answer familiar and usual questions. It must be shown that he was able to exercise a competent understanding as to the general nature of his property, as to the state of his family and as to the general condition and claims of the object of his bounty, as to the value of the instrument he executes and general objects and provisions which it contains. If he can do that, though he may be very feeble and debilitated in understanding and be at the point of death, it is enough(r). The mere fact that before execution of the will an injection was given and blood transfused into the person making the will is not sufficient to prove mental incapacity(s). In Jarman on Wills 7th Edn. at p. 54 it is stated that in case of weakness of mind, arising from the near approach of death, strong proof is required that the contents of the will were known to the testator and that it was his spontaneous act. But it is not essential that the testator should at the time he signs the will be mentally competent to understand it, if, while he is mentally competent gives instructions for his will and it is prepared in accordance with them at the time of signing it he understands that he is executing the will for which he had given instructions, the will is valid, although at the time of signing it he may not be able to understand its provisions in detail(t). The real test in all cases of this kind is whether the testator had a proper appreciation or comprehension of his act(u). The leading case is *Sala Mahomed v. Dame Janbai*(v), otherwise known as the Sir Tharia Topan will case. In that case a will and five codicils of a Khoja were propounded for probate. The widow of the deceased applied for the probate of the will and of all the five codicils, the last codicil was made about three days before the death of the testator. The son applied for probate of the will and of the first two codicils only; he contended that the last three codicils were made under the undue influence of the wife. It was asserted that the wife was of a commanding character, that the testator was on account of his old age too feeble and weak to resist the influence of his wife.

(p) *Sajid Ali v. Ibad Ali*, 23 Cal. 1.

(q) *Kinleside v. Harrison*, 2 Phill. 462.

(r) *Esoof v. Ismail*, A. I. R. (1938) R. 322.

(s) *Garibshaw v. Patia Dassi*, A. I. R. (1938) C. 290.

(t) *Purshotam Ram v. Kesho Das*, A. I. R.

(1945) L. 3

(u) *Harwood v. Baker*, 3 Moo. P. C. 282; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 278; *Handley v. Stacey*, 1 F. and F. 574; *Sajid Ali v. Ibad Ali*, 23 Cal. 1, 22 I. A. 171.

(v) 22 Bom. 17 (P. C.),

As regards the last codicil the son further disputed it on the ground that his father was almost unconscious and was unable to understand what he was doing. The trial Court accepted the contentions of the son and granted probate of the will and of the first two codicils only. The Appeal Court granted probate of the will and of all the five codicils. On appeal to the Privy Council it was held that the general assertion of the wife's commanding character and of the husband's weakness was not enough to establish undue influence and they granted probate of the will and of four codicils. As regards the last codicil they held that the testator was too exhausted and ill for such a testamentary act. A sickman may well be able to answer simple questions about the state of his body and yet be quite unequal to the effect of making new dispositions of his property. In *Malappa v. Tiparwa*(w) the will of a man suffering from epileptic fits was held to be bad. In *Woolmer v. Daly*(x), the will of a testator who was suffering from paralysis was held to be good as the paralytic stroke had not affected his mental capacity to such an extent that he was unable to understand a will of a simple nature. Another leading case on this point is *Bur Singh v. Uttam Singh*(y). In that case the testator was taken ill in May 1898. He made the will in dispute on 11th June 1898 and died on 23rd June 1898. It was proved that the testator was of intemperate habit. It was contended that the will was executed under undue influence of Bur Singh when the testator was ill and Bur Singh got benefits under it. Their Lordships observed that the onus of proving the testamentary capacity lay on those propounding the will and that onus was discharged by the evidence in support. "Such evidence is not displaced by mere proof of serious illness and of general intemperance."

Attention is also drawn to illustrations (vi) and (vii) to section 61. The weak state of the man's health must be such as to take away his free agency.

Mental infirmity is the effect of the morbid state of mental faculties. A will, however, made in contemplation of suicide is good unless the circumstances are such that the testator be deemed in law to be insane. The verdict of the jury that the testator was of unsound mind when he committed suicide is not sufficient if it is otherwise proved that the testator had testamentary capacity when he wrote the will(z). According to Mahomedan law if a will is made after taking poison it is bad but not if it is made before(a).

Instructions for Will.—If a testator while he is mentally competent gives instructions for a will and it is prepared in accordance with those instructions and at the time of signing it he understands that he is executing the will for which he had given instructions, the will is valid, (see Jarman on Will 7th Edn. p. 54). In *Sarabai v. Mahomed*(b), mere instructions given for will were admitted to probate.

In such cases a lesser strictness of onus is thrown on the person propounding the will. This principle is laid down in *Parker v. Felgate*(c), which case was followed in *Saradindunath v. Sudhir Chandra*(c¹).

60. A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

Testamentary
guardian.

(w) 32 Bom. L. R. 1289.

(x) 1 Lah. 173.

(y) 38 Cal. 355 (P. C.)

(z) *Burrows v. Burrows*, 1 Hagg. 109; *Hoby v. Hoboy*, 1 Hagg. 146.

(a) *Mazhar Husen v. Bodha Bibi*, 21 All. 91 (P. C.).

(b) 43 Bom. 641.

(c) (1883) 8 P. D. 171.

(c¹) 50 Cal. 100; 35 C. L. J. 569; In goods of *Amulya Kumar Bose*, 42 C. W. N. 649; *Eusooof v. Ismail*, A. I. R. (1938) R. 322.

(This is sec. 47 of the Succession Act of U 1865. It does not apply to Hindus etc. See Schedule III)

A father, *whatever his age may be*, may by will appoint a guardian or guardians for his child during minority. In case of European British subjects and other persons governed by the Succession Act only a *father* has the power to appoint a testamentary guardian of his minor children. The Guardian and Wards Act No. VIII of 1890, however, gives also to the mother, if the father is dead, the right to appoint a guardian either by will or by any other instrument. But the mother must be a major. A mother of an illegitimate child has power under the Guardian and Wards Act to appoint a testamentary guardian of her child(*g*). Under this section it is only the father who at whatever age can make an appointment by will.

This section does not apply to Hindus. But under the Hindu law a Hindu father can by word of mouth or by writing nominate a guardian for his children during their minority so as to exclude even the mother from the guardianship(*e*). A Hindu mother has no power to appoint a guardian by will(*f*). A Hindu father can only appoint a guardian of the person of the minor and not of his property(*g*). Even if the father is a manager of a joint Hindu family he cannot by will appoint a guardian or manager of the coparcenary property of the minor coparcener(*h*).

A will merely appointing a guardian of a minor does not require probate to be taken out as a condition precedent to the maintainability of an application by him under the Guardian and Wards Act to be appointed guardian of the minor(*i*).

61. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will obtained by fraud, coercion or importunity.

Illustrations

(i) A, falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) A threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a will, dictated by B. It appears that he would not have executed the will but for fear of B. The will is invalid.

(vi) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a will of a certain purport and does so merely to purchase peace and in submission to B. The will is invalid.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the

(d) *In re A. S. v. A.*, (1940) W. N. 271.

(e) *Budhilal v. Morarji*, 31 Bom. 418.

(f) *Venkayya v. Venkata*, 21 Mad. 401.

(g) *Alagappa v. Mangathai*, 40 Mad. 672.

(h) *Brijbhukandas v. Ghashiram*, 37 Bom. L. R. 1 (F. B.)

(i) *Ganeshji Pande v. Bhagirathi*, 58 All. 832; *Pathan Ali Khan v. Panibai*, 19 Bom. 832.

free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatter him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

(This is sec. 48 of the Succession Act X of 1865. It applies to Hindus.)

Fraud.—The word “fraud” has been defined in sec. 17 of the Contract Act; it is not a definition but an explanation. “Fraud being infinite the Court will not define it”. Fraud is either actual or constructive. Actual fraud is subdivided into two parts, (a) misrepresentation and (b) concealment. Illustration (i) is an instance of misrepresentation. Misrepresentation (called *suggestio falsi*) must be of a material fact and must have been relied on or acted upon by the person deceived. If the party to whom misrepresentation is made is not misled by it or knows it to be false there is no fraud.

Concealment (called *suppressio veri*) is the suppression or withholding of some material fact being some fact which the one party was under a legal duty to the other to disclose(j). Therefore, where there is no such duty, there is no fraud.

Constructive fraud is of various kinds but for the purpose of invalidating a will, if the will is made by a testator at the instance of another who has abused some fiduciary relation, it will be declared null and void. Cases of importunity and undue influence come under this group.

A will which is the result of fraud of the one or other kind is null and void(k). The section speaks of a will or any part of a will, therefore, if a part of the will is obtained by fraud, probate ought to be refused as to that part, and granted as to the rest unless the part rejected alters the whole sense of the remainder of the will(l).

Example

The health of the testatrix was failing. The executrix legatee under the will who had influence over the testatrix falsely misrepresented to her and made her believe that she was heavily indebted to the legatee and got the testatrix to execute the will in her favour. Held, will procured by fraudulent misrepresentation and probate was refused(m).

Coercion.—Coercion is defined by sec. 15 of the Contract Act as “the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement”. It is the first portion of the definition which would properly apply. To constitute under influence in the eye of law there must be coercion(n). Whatever destroys the free agency of the testator constitutes coercion.

If actual force was used to compel the testator to make the will and all the formalities are complied with, yet the will is void(o). So also if the testator is labouring under some fear at the time of bequeathing. But “it is not every fear or a vain fear” that will have the effect of annulling the will; but a “just fear” that the law can take cognisance of, as the fear of death, or of bodily hurt, or of imprisonment.

Illustration (iv) is an instance of a will obtained by coercion(p).

(j) *Turner v. Green*, (1895) 2 Ch. 206.

(k) *Allen v. Mcpherson*, 1 H. L. 191; *Boyse v. Rosborough*, 6 H. L. C. 49.

(l) *Rhodes v. Rhodes*, L. R. 7 App. Ca. 192.

(m) *Nabagopal v. Sarala*, A. I. R. (1933) C.

574.

(n) *Wingrove v. Wingrove*, L. R. 11 P. D. 81.

(o) *Mountain v. Bennett*, 1 Cox. 355.

(p) *Prasannamayee v. Baikuntha*, 49 Cal. 132.

Importunity or Undue Influence.—"This in its legal acceptation must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist, such as will render the act no longer the act of the deceased, the free act of a capable testator". The expression used in this section is "importunity as takes away the free agency of the testator."

Undue influence as defined by sec. 16 of the Indian Contract Act is that relation which subsists between the parties by which one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over that other. Ill. (v) is an instance of undue influence; ill. (vi), (vii) and (viii) are instances of importunity. It is not unlawful for a man by honest intercession and persuasion to procure a will in favour of himself or another person; it is not necessary that the making of a will *must originate* with the testator, but when the persuasion is used to such an extent as to amount to force and coercion, destroying free agency, then the will will be void. Mere influence of affection or attachment is not enough. See *Boyse v. Rossborough*(q), where the subject of undue influence is fully discussed. Lord Cranworth in delivering the judgment in that case says, "that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud.....it is not necessary to establish that actual violence has been used or even threatened....It is extremely difficult to state in the abstract what acts will constitute undue influence. It is sufficient to say they must range themselves under one or other of these heads—coercion or fraud. To be undue influence in the eye of law there must be—to sum up in one word—coercion"; e.g., a young man may be caught in the coils of a harlot who makes use of her influence to induce him to make a will in her favour to the exclusion of his relatives. The will is not void. Again, a man may be the companion of another who leads him to evil courses and thus obtains what is commonly called an undue influence over him and the consequence may be a will in his favour. This again will not amount to undue influence in law, so as to vitiate the will(r).

Undue influence is coercion only if it takes away the free agency of the testator. Whatever destroys the free agency of the testator constitutes coercion, i.e., that the volition of the testator was repressed, that the pressure was such as the testator could not resist(s). The mere fact that in making his will he was influenced by immoral (*Hall v. Hall*(t), *Baudains v. Richardson*(u)) or irreligious (*Morley v. Loughman*(v)) consideration does not amount to such undue influence so long as the dispositions contained in the will really express his wishes. Ills. (vii) and (viii) practically lay down the rule which should guide the Courts on the questions of importunity(w). It is not enough to show that the testator's mind was dominated by the propounder but it must be shown further that the influence was exercised on the particular occasion and the will was the result of that influence(x). Undue influence becomes the subject of consideration in cases of persons of old age or of weak intellect or in cases of persons related to each other, e.g., between a trustee and a *cestui que trust* or any other fiduciary relation or between a father and son and a husband and wife. In case of wills of persons of old age it is not mere old age that would give rise to suspicion, but extreme old age tends to excite the jealousy of the Court(y). Again in respect of wills when one person stands in a fiduciary relation to another and is in a position to dominate the will of that other and by so using his position he obtains a benefit

(q) 6 H. L. 2.

(r) *Wingrove v. Wingrove*, L. R. 11 P. D. 81.(s) *Jajneshwari v. Ugreshwari*, 11 C. W. N. 824.(t) *Ha. L. R.* 1 P. & D. 481.

(u) (1906) A. C. 169.

(v) (1898) 1 Ch. 786.

(w) *Jajneshwari v. Ugreshwari*, 11 C. W. N. 824.(x) *Nabagopal v. Sarala*, A. I. R. (1933) C. 574.(y) *Sajid Ali v. Ibad Ali*, 22 I. A. 171.

for himself, the will is void. "Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them"(z). If a solicitor prepares a will for a testator under which certain benefits are conferred on him it will lie on him to discharge the onus(a).

In the leading Privy Council case of *Bur Singh v. Uttam Singh* (b) the test laid down to ascertain undue influence is as follows: "In order to set aside a will there must be clear evidence that the undue influence was in fact exercised or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property." The mere proof of the relation of parent and child, husband and wife, doctor and patient, and solicitor and client does not raise a presumption of undue influence to vitiate the will. A wife may use her influence over her husband to induce him to make the will in her favour. That would not be coercion or undue influence. If all that can be shown is that there was motive or opportunity for the exercise of undue influence that is not enough. Even the fact that the person propounding the will has benefited is also not enough. Such circumstances may create suspicion and would lead the Court to scrutinize the evidence with special care (c).

As regards the exercise of undue influence by wife over her husband the leading Privy Council case is *Sala Mahomed v. Dame Janbai* (d). It was there held that the evidence as to the general assertion of the wife's commanding character and of the husband's weakness was not enough to establish undue influence. Although this section does not apply to Mahomedans as they are not governed by this Act at all, it is a useful guide as to what does or does not constitute undue influence under the Mahomedan law. A will executed by a Mahomedan under undue influence is void and in cases of will of a Pardanishin lady it must be shown that the executant thoroughly understood what she was doing and whether she was fully acquainted with the terms of the document (e). In *Motibai v. Jamsetjee* (f), their Lordships laid down the rule that in matters of deception it was essential that the decision of the Court should rest not upon suspicion but upon legal grounds. In that case a caveat was filed by the son alleging that the will was executed by his father under the undue influence, excessive persuasion and moral coercion of the wife. Evidence of the doctor in attendance and who had attested the will and who stated that when the testator put his signature, he was too ill to understand what he was doing was disbelieved and probate was granted. See also *Boyse v. Rossborough* (g). It is not improper for a wife to gain by her conduct the affection of her husband and thereby obtain benefit for herself. It is only if a wife by falsehood raises prejudices in the mind of her husband and by contrivance keeps him aloof from his relatives and by such contrivances induces the husband to will away his properties to her, that such a conduct would excite the jealousy of the Court (h). Conversely if a husband uses his position to dominate the will of his wife the transaction would be declared null and void (i). When dealing with the case of a will of a parda lady a particular and peculiar onus rests upon those who propound the will. They must show that the executant thoroughly understood what she was doing and was fully acquainted with the terms of the

(z) *Vaughton v. Noble*, 30 Beav. 34 at 39.

(a) *Gangabai v. Bhagwandas Waljee*, 32 I. A. 142.

(b) 38 Cal. 355 (P. C.).

(c) *Vellasawmy v. Sivarman*, 32 Bom. L. R. 511 (P. C.); *Ranghava v. Sheshappa*, 51 Bom. 258.

(d) 22 Bom. 17 (P. C.).

(e) *Khas Mehal v. The Administrator General of Bengal*, 5 C. W. N. 505.

(f) 29 C. W. N. 45 (P. C.).

(g) 6 H. L. 2.

(h) *Morison v. Adm.-General*, 7 Mad. 515.

(i) *Turnball & Co. v. Duval*, 6 C. W. N. 809.

document she was executing (j).

The influence by religious preceptor or spiritual adviser or guide may also become undue influence see *Hugueinin v. Baseley (k)* and *Hall v. Hall (l)*. It was for this reason that it is provided by sec. 118 that will containing bequests to charity is required to be executed twelve months before the date of the death of the testator.

Rule in Barry v. Butlin (m).—Where a will is prepared by a person or where its execution is conducted by a person who is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased (n). *Barry v. Butlin* lays down two rules:—

(1) That the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator (o).

(2) That if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper does express the true will of the deceased (p).

In *Tyrrell v. Painton (q)*, Lindley, L. J., stated that “the rule in *Barry v. Butlin* is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will.” The benefit contemplated by this rule is not necessarily a pecuniary benefit, e.g., a legacy. In *Sarat Kumari v. Sakhi Chand (r)* the benefit conferred was that J who propounded the will was appointed as the manager of the testator’s estate for life at Rs. 250 per month. This was a benefit on him. J had taken an active part in the preparation of the will. It was held that J had not discharged the onus which lay on him in accordance with the rule in *Barry v. Butlin*. The whole will, however, was not rejected but the clause which conferred benefit on J was excluded and probate was ordered of the rest of the will. This case was followed in *Malappa v. Tipava (s)*.

In practice, however, when applying these rules the Court will take into consideration the amount of the benefit conferred on the person preparing the will and his relationship to the testator. All that can be said is that when a person prepares a will under which he takes a benefit, that is a suspicious circumstance of more or

(j) *Khas Mehal v. Adm.-General of Bengal*, 5 C. W. N. 505; *Sarakumari v. Amullyadhan*, 25 Bom. L. R. 548 at 556 (P. C.).

(k) 14 Ves. 273.

(l) L. R. 1 P. & D. 481.

(m) 2 Moo. P. C. 450.

(n) *Eusooif v. Ismail*, A. I. R. (1938) R. 22.

(o) *Musli. Padma v. Dharma Das*, 15 C. W. N. 728; *Surendra v. Rani Dassi*, 47 Cal. 1043.

(p) *Rangava v. Sheshappa*, 51 Bom. 258.

(q) (1894) P. 151.

(r) 31 Bom. L. R. 270 (P. C.); 56 I. A. 62.

(s) 32 Bom. L. R. 1289. See also *Hormasji v. Dhanjishaw*, 12 Bom. L. R. 569; *Ganpatrao v. Vasantrao*, 34 Bom. L. R. 1871; *Pandurang v. Dwarakadas*, 35 Bom. L. R. 700; *Shama Charn v. Khetoromoni Dasi*, 27 Cal. 521, 27 I. A. 10; *Jarat Kumari v. Bissessur*, 39 Cal. 245; *Bu Singh v. Uttum Singh*, 38 Cal. 355; 38 I. A. 18; *Bai Gangabai v. Bhagwandas Waljee*, 32 I. A. 142; *In the goods of Gopessen Dutt*, 16 C. W. N. 265.

less weight, according to the facts of the particular case, varying according to the quantum of legacy and the proportion it bears to the property disposed of (t).

The standard of proof to establish a will required is not an absolute or conclusive one but such as would satisfy a prudent man (u). The evidence as to undue influence should be in relation to the will itself and not in relation to other matters (v).

Mistake.—There is no provision under this section or any other section of the Act for a will made under a mistake. But under English law a will executed by mistake is void. In *re Fanny Deborah v. Meyer* (w) two sisters executed two codicils but by mistake each sister executed the codicil intended for that of the other. One of the sister died and on an application for probate, the grant was refused. Words or clauses introduced into a will by mistake or accident without the knowledge of the testator may be struck out (x). But a mistake in a will cannot be corrected or an omission supplied, unless it clearly appears by fair inference from the whole will. When a clause has been introduced in a testamentary paper by mistake, and the deceased executes the paper not having given any instructions for such clause, *it not having been read* over to him, probate will be granted of the will, omitting such clause (y). But the Court will not exclude any passage or clause where it is proved that the will had been read over to a capable testator and executed by him (z). (See Mortimer on Probate, pp. 104-107).

Will may be revoked or altered. **62.** A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

(This is sec. 49 of the Succession Act U of 1865. It applies to Hindus.)

Revocation of Unprivileged Wills.—A will is a revocable instrument as distinguished from a deed. A will of a living man does not come into operation when it is executed but only upon his death. A will is in its nature ambulatory during the maker's lifetime and is, therefore, always revocable so long as the testator is living. Even if the will is expressly made to be irrevocable, it can be revoked by the maker of it if the instrument is of a testamentary nature. But in such a case it must be borne in mind that where a covenant is given by a person to another not to revoke a will, the covenant will be a binding covenant for breach of which an action will lie for damages, though the covenant cannot be specifically enforced, that is to say, the covenant will not prevent the person from revoking the will (a). In *re Marsland* (b) a testator made a will in which he made certain bequests in favour of his wife and children. He thereafter executed a deed of separation between him and his wife and it contained a covenant on the part of the husband not to revoke the will or to alter it so as to affect the bequest in favour of the wife and children. The wife died first and the husband married again and a question arose whether the will was revoked by the second marriage. It was held that the will was revoked and that there was no breach of covenant. No suit will lie for cancellation of the will in the lifetime of the testator (c).

(t) *Lachho Bibi v. Gopi Narain*, 23 All. 472; *Digamber v. Narayan*, 13 Bom. L. R. 38; *Low v. Guthrie*, (1909) A. C. 278; *Ganpatrao v. Vasantrao*, 34 Bom. L. R. 1371; *Pandurang v. Dwarkadas*, 35 Bom. L. R. 700.

(u) *Jarat Kumari v. Bissessur*, 39 Cal. 245; *Shunmugaroya v. Manikka*, 32 Mad. 400, 36 I. A. 185; *Surendra v. Jahnavi*, 56 Cal. 390.

(v) *Boyse v. Rossoborough*, 6 H. L. 47.
(w) (1908) P. 353.

(x) *Fulton v. Andrew*, L. R. 7 H. L. 448.

(y) *In the goods of Duane*, 2 Sw. and Tr. 590.

(z) *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109; *Hormusjee K. Sethna v. Dhunjishaw R. Lalca*, 12 Bom. L. R. 569.

(a) *Robinson v. Ommanney*, 23 C. D. 285; *Re Parkin, Hill v. Schwarz*, (1892) 3 Ch. 510; *Maddison v. Alderson*, 8 A. C. 467; *Loffus v. Maw*, 3 Giff. 592.

(b) (1889) W. N. 251; (1889) 1 Ch. 820.

(c) *Rambhajan v. Gurcharan*, 27 All. 14.

The only instance in which a will cannot be revoked is in the case of mutual or joint wills which become irrevocable after the death of one of the makers, if the survivor takes advantage of the provisions made by the other (d).

As to the modes prescribed for revocation, see sec. 70.

CHAPTER III.

Of the Execution of Unprivileged Wills.

63. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules :—

Execution of unprivileged wills.

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

(This is sec. 50 of the Succession Act X of 1865 with slight alterations in clause (c) where the words "has" and "shall" are substituted for the word "must". It applies to Hindus. The words "or an airman so employed or engaged" are inserted by Sec. 2 and Sch. I of Act X of 1927.)

Unprivileged Will—Its Execution and Attestation

This section deals with the execution of unprivileged wills and is taken from sec. 9 of the English Wills Act, 1837. Under this Act a will must be in writing: an oral or nuncupative will is not recognised. This section is now made applicable to all wills made by Hindus etc. in all parts of British India after 1st January, 1927. (See section 57 clause (c) and the commentary at pp. 80-83).

There are two rules to be observed in the execution of an unprivileged will—first as to the signature of the testator, and second as to the signature of the attesting witnesses.

Clause (a)

(A) Signature of the testator.—

- (1) It shall be *signed* by the testator or shall have his *mark* affixed to it, or.
- (2) It shall be signed by some other person *in his presence* and *by his direction*.

(d) *Dufour v. Pereira*, 1 Dick 419; *In re Hagger, Freeman v. Ascott*, (1932) 2 Ch. 190.

(1) This clause requires, when the testator himself signs the will, that it shall bear his signature or his mark if the testator is illiterate. Even if the testator is capable of writing but on account of weakness or any other incapacity he is unable to write his signature he may execute the will by a mark and in doing so his hand may be guided by another person (e). Even a thumb impression is held to be good (f). In *Nirmal Chunder v. Saratmoni* (g) a rubber stamp impression where the testator was in the habit of using the rubber stamp was held to be good. But the mark must be made by the testator and not by some other person for the testator (h). If a testator intentionally or unintentionally signs under a wrong or assumed name still if he signs *animo testandi* it is sufficient (i). Under the General Clauses Act X of 1927 the word "sign" with reference to a person who is unable to write his name shall include "mark."

(2) According to English law "some other person" may be the attesting witness. But according to this section, it would not be proper (j). When the will is not signed by the testator but by some other person on his behalf then this clause requires that that person must sign the will in the presence of and under the direction of the person whose will he signs. According to English practice when a person signs for the testator by his direction, he may sign either the testator's name or his own name for the purpose of giving effect to such directions, (Tristram & Coote's Probate Practice 17th Edn., p. 29). The section requires the signature and not the mark of the person signing on behalf of the testator. See, however, *Theresa v. Francis* (k) and *Nitya Gopal v. Nagendra Nath* (l), where mark of the person signing on behalf of the testator was held to be good. But according to sec. 63 (a) when some other person signs on behalf of the testator the proper form of signature is for the other person to sign the name of the testator and not his own (m). This is, however, merely to furnish *prima facie* evidence of due execution.

If the person signs for the testator, besides himself there must be two other persons as attesting witnesses (n).

Examples

(1) A will was executed by the testator by asking the Vicar to affix his signature and the Vicar signed as follows.—"The mark of Pedru Pascol Misquita by the hand of F. V. D'Souza Held will properly executed(o).

(2) R, who was an illiterate woman, touched the pen and then gave it to K who made the mark and added a memorandum that that was the mark of R. This was done in the presence of and by the direction of R. Held will validly executed(p).

(3) A gave instructions for drawing his will and the will was drawn up and read over to A when A was in her senses. Later on when B asked her if he would sign the will for her and A nodded her assent whereupon B guided A's hand to make the mark and then B put down A's name under the mark. Held will properly executed(q).

Clause (b)

Place of signature.—According to this clause the signature or mark of the testator or the signature of the person signing for him may be placed any where on the will, *i.e.*, either at the commencement or at the end; but it must be so placed

(e) *Gulabkhan v. Amina*, 28 Bom. L. R. 529; *Amulya Kumar Bose, In the goods of*, 42 C. W. N. 649.

(f) *Theresa v. Misquita*, 28 Bom. L. R. 399.

(g) 25 Cal. 911.

(h) *Radhakrishna v. Subraya*, 40 Mad. 550.

(i) *Re Redding*, (1852) 2 Rob. 339.

(j) *Acabai v. Pestanji*, 11 B. H. C. R. 87.

(k) 45 Bom. 989.

(l) 11 Cal. 429.

(m) *Dasureddi v. Venkatasubbammal*, 57 Mad.

979.

(n) *In the matter of Hemlota Dabee*, 9 Cal. 226; *Avabai v. Pestanji*, 11 B. H. C. 87; *In the goods of Grish Chunder*, 11 C. H. C. 359; *Radhakrishna v. Subraya*, 40 Mad. 550.

(o) *Theresa v. Francis Misquitta*, 45 Bom. 389=28 Bom. L. R. 399.

(p) *Dasureddi v. Venkatasubbammal*, 57 Mad. 979.

(q) *Muktanath v. Jitendra Nath*, 19 C. W. N. 1295.

that it shall appear that it was intended to give effect to the instrument as a will. In England the law is different. The Wills Act, 1837, sec. 9, enacted that no will was valid unless it was signed "at the foot or end thereof." The Wills Act Amendment Act, 1852, section 1, provided that "every will shall, so far as regards the position of the signature of the testator be deemed to be valid if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it."

According to clause (b) the signature need not necessarily be at the end of the will. It does not matter in what part of the will the testator signs. In the wills executed in vernacular language it is usual to put the signature on the top of the will. This is valid execution (r). In *In the goods of Porthouse* (s), the testator had written his name in the attestation clause and it was held to be good execution; see also *Aharendra v. Kashi Nath* (t), where the signature was at the commencement. In *In re W. E. Roberts* (u), the signature was in the right hand margin of the will and it was held to be valid execution. In *Goods of Mann* (.) the testatrix wrote out her will on a sheet of paper. One of the attesting witnesses was present when the testatrix was writing the will. The other attesting witness was also present when the testatrix was writing the last part of the will. After completing the writing she put it in an envelope and wrote on the envelope, "The last will and testament of Jane" and requested the witnesses to sign their names as witnesses. Thereupon the witnesses subscribed the paper at foot of the document underneath the words "In the presence of witnesses." After the witnesses had signed, the will was put into the envelope but she did not put her signature on the will. After some time when the testatrix was taken to the hospital another envelope was brought and the whole packet was put in that envelope, and the envelope was superscribed "The last will of Jane Catherine Mann." It was held that the will was properly executed, although the signature of the testatrix was only on the envelope and not on the document itself. While delivering the judgment Langton, J., observed that the envelopes are by their nature designed to have what may be described as a dependent and secondary existence rather than an independent and primary life of their own. The will in the present case is a holograph document and was written with the same pen and on the same occasion as the envelope. Both the paper and the envelope were written in the presence of the attesting witnesses and if an unattached paper is to be admitted at all there is much to be said in favour of an envelope which may reasonably be held to have a far closer relationship to a document than a disconnected piece of paper. But see contra *In re Estate of Bean* (v). If a will is written on several sheets of paper it is not necessary that all sheets should be severally signed. One signature on the last sheet made with the intention of executing the whole is sufficient (x). Initials of the testator would be sufficient.

Clause (c)

Attestation.

The will shall be attested by two or more witnesses.

- (1) Each witness must have seen the testator sign or affix his mark, or
- (2) Each witness must have seen some other person sign the will in the presence and by the direction of the testator, or

(r) *Savitri v. F. A. Sain*, 19 C. W. N. 1297.

(s) 24 Cal. 784.

(t) 27 Cal. 169.

(u) (1934) 1 K. B. 102.

(v) (1942) P. 146.

(w) (1944) W. N. 172.

(x) *Sagore Chandra v. Digambar*, 14 C. W. N. 174; *Lewis v. Lewis*, (1905) P. 1.

(3) If the will is already signed each witness must have received from the testator a personal acknowledgment of his signature or mark or of the signature of such other person signing for him.

It is not, however, necessary, that both the witnesses should be present at one and the same time (y).

The testator may sign in the presence of one witness and acknowledge his signature before another witness. The fact that a witness is underage does not disqualify him provided he has the requisite understanding to testify as a witness, (see sec. 118 Indian Evidence Act). A scribe can be an attesting witness but it must be shown that his signature was put for attesting the will (z).

Oudh Estates Act :—Under sec. 19 of the Oudh Estates Act an unattested will by a Talukdar whose name is included in the lists prepared under the Act is invalid (a).

What is Attestation.—The attestation must be *animo testandi*. The words used in this section are that the two witnesses shall attest and each of the witnesses shall sign the will. The Legislature has made a distinction between mere signing and attesting. Attesting is more than a mere signing of the will. If a person puts his signature stating that he read and explained the will before execution is not attesting witness (a¹).

In *Shiam Sunder v. Jagannath* (b) the will contained this clause: "I have executed this will with the consent of all my sons and have got them to sign it as witnesses so that the will may be acted upon fully and they may not quarrel after my death." The sons appended their signatures. It was held they were not attesting witnesses. What is essential is that each witness must sign the will in the presence of the testator (c), though the testator need not sign in their presence. It is also not necessary that both or all the witnesses should be present at the same time (d). In *Sabitri v. Savi* (e), the testator, after having executed the will in the presence of one attesting witness, took it to the place of two other witnesses who on his acknowledgment of his signature attested the document and it was held to be good attestation. In this respect section 63 differs from the English Act which requires both the attesting witnesses to be present at the same time. The attestation must be after the testator has signed the will and not before (f). The attestation must be by the signature of the witnesses and not by their mark (g). *Fernandez v. Alves*, and *Nitye Gopal v. Nagendra Nath* were considered in the case of *Maikoo Lal v. Santoo* (h), and it was held that a will was validly attested within the meaning of this section if the witnesses merely affixed their marks as the law was changed after the passing of the General Clauses Act (X of 1897) where the word "sign" includes "mark." This case was followed in *Annu v. Rama* (i). The initials of attesting witnesses are sufficient (j).

Publication :—It is not necessary that the attesting witnesses should know contents of the will. The testator need not disclose the nature or contents of the instrument. Mere attestation is not enough to prove that the attesting witness had knowledge of the contents of the will (k).

(y) *Savitri v. F. A. Satin*, 19 C. W. N. 1297.
(z) *Jnanda v. Birendra*, 69 C. L. J. 347; A. I. R. (1939) C. 895.

(a) *Dulahir Jadunath v. Raja Bisheshar Baksh*, A. I. R. (1931) P. C. 50.

(a¹) *In the goods of Gokul Chand*, (1944) 2 Cal. 388.

(b) 30 Bom. L. R. 110 (P. C.).

(c) *Deo v. Manifold*, 1 M. & S. 249; *Newton v. Clarke*, 2 Curt. 320; *Tribe v. Tribe*, 7 Notes of Cas. 132.

(d) *Sarada v. Triguna*, 1 Pat 300.

(e) 19 C. W. N. 1297.

(f) *Bissonath v. Doyaram*, 5 Cal. 738.

(g) *Fernandez v. Alves*, 3 Bom. 382; *In the matter of Hurro Sundari Dabia*, 6 Cal. 17; *Nitye Gopal v. Nagendra Nath*, 11 Cal. 429; *Horendranarain v. Chandrakanta*, 16 Cal. 19; *Mahendra Nath v. Netai Charan*, A. I. R. (1944) C. 241.

(h) 58 All. 1064; A. I. R. All. 576 (F. B.).

(i) 39 Bom. L. R. 606.

(j) *Ammayee v. Yakumalai*, 15 Mad. 261; *Harrison v. Harrison* 8 Ves. J. 184.

(k) *Rajammal v. Sabapathi*, (1945) M. L. J. 397 P. C.

What is Acknowledgment.—When the testator does not execute the will in the presence of the attesting witnesses but the attesting witnesses put their signatures on the *personal* acknowledgment of the execution of the will by the testator, the question arises what would in law constitute a sufficient acknowledgment and the result of the cases decided appears to be as follows:—It is not necessary that the testator should in express terms say, “That is my signature.” It would be sufficient, if the testator produces a paper and makes his witnesses understand that it is his will, even though the witnesses do not see him sign it or observe his signature, provided the Court is satisfied that the testator’s signature was there, when the witnesses attested it (*l*). “Where the testator produces the will with his signature *visibly apparent* on the face of it to the witnesses and requests them to subscribe it, this is a sufficient acknowledgment of his signature, but not where they are unable to see the signature and the testator merely calls them to sign, without giving them any explanation of the instrument they are signing.” (Williams on Executors, 12th Edn., pp. 47-48). The whole law as to what is a sufficient acknowledgment is fully discussed in *Blake v. Blake* (*m*), where it is laid down, that where the evidence is such that the Court concludes that the witnesses did not see the signature, the fact that the testator spoke to the witnesses that it was his will is not a sufficient acknowledgment, if the witnesses were not able to see his signature. The witnesses must at the time of acknowledgment see or have the opportunity of seeing the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation or whether the testator say that the paper to be attested is his will. If the signature of the testator is covered up so that the attesting witnesses do not see it, there would be no sufficient acknowledgment (*n*). But if the attesting witnesses had an opportunity of seeing it, that would be sufficient, though in fact they did not see it. The Bombay High Court in *Balmukund v. Bhagvandas* (*o*), has laid down that it is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it (*p*). The testator alone can make an acknowledgment and not the attesting witness (*q*).

Sec. 63 requires the personal acknowledgment by the testator; a request by a third party to the witnesses to subscribe to the will would not be a sufficient acknowledgment.

The acknowledgment must be made by the testator before the witnesses subscribe to the will. An acknowledgment after the attestation is insufficient (*r*).

Acknowledgment before Registrar.—When a testator admits execution before the Registrar and is properly identified and the Registrar and the identifying person attest the will in the presence of the testator, it is sufficient (*s*). In *Purshottam v. Kesho Das* (*t*) the will was attested by one witness. The will so signed was registered. The Registrar was called to the house of the testatrix and it was then signed by a witness who identified the lady and the Registrar signed it in the presence of the testatrix who acknowledged her signature to him and it was held to be a sufficient compliance of the provisions of this section. But the mere endorsement of the Registrar cannot be taken as attestation where there

(*l*) *Ilott v. Genge*, 3 Curt. 172; *Manickbai v. Hormasji*, 1 Bom. 547, 376 (cheap edition); *Amarendra Nath v. Kashi Nath*, 27 Cal. 169.

(*m*) 7 P. D. 102.

(*n*) *Ilott v. Genge*, 4 Moo. P. C. 265.

(*o*) 15 Bom. L. R. 209.

(*p*) See *Manickbai v. Hormasji*, *supra*; see also *Sibo Sundari v. Hemangini*, 4 C. W. N. 204.

(*q*) *Moore v. King*, 3 Curt. 243.

(*r*) *In the goods of Olding*, 2 Curt. 865; *Cooper v. Bockett*, 4 Moo. P. C. 419.

(*s*) *Nritye Gopal v. Nogensdra*, 11 Cal. 429; *Horendranarain v. Chandrakanta*, 16 Cal. 19; *Amarendra v. Kashi Nath*, 27 Cal. 169; *Sarada Prasad v. Triguna*, 1 Pat. 300; *Theresa v. Francis*, 45 Bom. 989.

(*t*) 25 Lah. 495; A. I. R. (1945) L. 3.

is no witness who could be said to have attested the will (u). See the observations of their Lordships of the Privy Council in *Gangamoyi v. Troiluckhya* (v). If a will is executed before the Registrar and the registrar signs the same, it does not by itself prove the capacity of the testator to make the will. The capacity to make such a will must be proved in the usual course (w). Where, however, the testator deposits the will under section 42 of the Indian Registration Act in a sealed cover bearing the superscription that the cover contains the testator's will and the Registrar endorses the cover in the manner required by section 43, the Registrar is not an attesting witness within the meaning of this section (x).

Scribe :—A person who writes the will and reads and explains it to the testator and makes a note to that effect on the will and signs it cannot be deemed to be an attesting witness (y).

Form of Attestation :—No particular form of attestation is necessary under this clause (z). The following is the usual form :—

Signed by the said A.B. the testator abovenamed as and for his last will and testament in the presence of us present at the same time who at his request in his presence have herunto subscribed our names as witnesses.	} A. B.
C. D.	
E. F.	

Oral or Nuncupative Will.

Hindus.—Under this Act, for persons governed by it, there is no scope for an oral will. Since the amendment of section 57, Hindus, Sikhs, Jains and Buddhists cannot make an oral will after 1st January 1927, (see commentary to section 57). The wills of Hindus etc., must comply with the provisions of section 63 as to due execution.

Mahomedans.—But the Mahomedans are not governed by this Act. Therefore, the will of a Mahomedan can be oral. If it is in writing it may be in any form. If it is in writing but not signed it will be valid. It is sufficient if the will is really and truly proved to be the will of the testator (a).

Cutchi Memons.—A will of a Cutchi Memon does not require attestation (b). A Cutchi Memon is *not* a Hindu within the meaning of the Hindu Wills Act (c).

Persons who have not a British Indian Domicile.

Wills made by persons who are not domiciled in British India so far as the same relate to *immoveable* property situate within British India must be executed in accordance with the rules given above. A will made by a person who is not domiciled in British India so far as the same relate to the *moveable* property of such person whether in British India or elsewhere must be executed in accordance with the law of his domicile at the time of his death wherever the will may have been executed. Accordingly where the will of moveable property of a foreigner is brought into this country for probate the Court should deal with the instrument exactly as the Court of the testator's domicile would deal with it. The question

(u) *Bulaki v. Mt. Dalia*, A. I. R. (1941) Pat. 388.

(v) 33 Cal. 537 (P. C.)

(w) *Sadachi Ammal v. Rajathi Ammal*, A. I. R. (1940) M. 815; 1939 M. W. N. 651.

(x) *Umakanta v. Bisambhar*, 8 Pat. 419.

(y) *In the goods of Gokul Chand*, (1944) 2 Cal.

388.

(z) *In the goods of Roymoney Dossee*, 1 Cal. 150.

(a) *Aulia Bibi v. Ala-ud-din*, 28 All. 715.

(b) *In re Aba Satar*, 7 Bom. L. R. 558.

(c) *In re Haji Ismail*, 6 Bom. 452; *Adv.-General v. Jimbabai*, 41 Bom. 181.

becomes complicated if the foreigner is domiciled in India. According to the English practice the will of personality of a foreigner who died domiciled in England would be admitted to probate if it is valid by the law of England but probate would be refused if the will is invalid on account of the testamentary capacity of the testator or non compliance with the formalities prescribed for due execution. On the other hand the will of personalty of a foreigner who died domiciled abroad would be admitted to probate in England, if it is valid by the law of the country in which the testator was domiciled at the time of his death, (Mortimer on Probate, pp. 31-32). The same practice would be followed under this Act (*d*).

Evidence of Due Execution.

The best evidence is that of the attesting witnesses. Where there is a direct cogent and positive testimony of all the attesting witnesses as to the due execution and attestation, the Court should not start off making all kinds of speculations as to the circumstances of speculation which make it probable that the will could have been executed. It is also not safe or sound rule to start speculating as to what might have been the motive of the testator in making the alleged will (*e*). A will can be proved by one of the attesting witnesses (*f*). Section 68 of the Indian Evidence Act does not say that a document required to be attested by two witnesses shall be proved by the evidence of all of them. All that the section provides is that such a document shall not be accepted in evidence unless the evidence at least of one of the witnesses is called. If one witness who is called is in a position to depose to all that is required by sec. 68(*c*) of this Act that would be sufficient proof of the due execution of the will (*g*). If one attesting witness fail to prove the due execution, the other attesting witness must be called, although he may be an adverse witness (*h*). If neither of the attesting witnesses can be found or both are dead any person who in fact saw the execution may be called (*i*). When both the attesting witnesses are dead and no other evidence is available and the will is in regular form the principle of "*Omnia præsumentur rite esse acta*," applies on proof of the handwriting of the testator.

When all the attesting witnesses are examined, the non examination of the writer of the will is not sufficient to prove that the story of the attesting witnesses is unworthy of credit (*e*).

In *Roda Kanta* (*i*¹) one of the attesting witnesses deposed that when he attested the will it was already signed by the testator, and the testator acknowledged his signature and thereupon he attested it. The will was not then attested by the other witness. It was held that the will was not proved and probate was refused.

But attestation does not estop a person from denying anything except that he has witnessed execution; knowledge of contents ought not to be inferred from the mere fact of attestation (*j*). It is also not absolutely necessary to adduce positive affirmative evidence of due execution to prove the will (*k*). In *Bankin Bihari v. Srimati Matangini* (*l*), their Lordships of the Privy Council did not consider the non-examination of all the attesting witnesses as destructive of the proof of due execution and they remarked that "there is on some occasion a tendency amongst litigants in India as elsewhere to back up a good case by false or exaggerated evidence." The Court may take into consideration all the circumstances of the case and when a will is regularly executed, on the face of it, an inference will arise

(*d*) *In the goods of McIntyre*, 41 All. 248.

(*e*) *Kristo v. Baidya Nath*, (1938) 2 Cal. 173.

(*f*) *Rammol v. Hakol*, 22 C. W. N. 315.

(*g*) *Venkatarama v. Sundarambal*, 42 Bom. L. R. 912 at p. 915.

(*h*) *Neal v. Denston*, 48 T. L. R. 637.

(*i*) *Mackay v. Rawlinson*, 63 Sol. Journal 229.

(*i*¹) 47 Bom.L.R. 709.

(*j*) *Pandurang v. Markandeya*, 24 Bom. L. R. 557 (P. C.).

(*k*) *Blake v. Knight*, (1842) 3 Curt. 547 at 561.

(*l*) 24 C. W. N. 626.

that all the requisites were complied with. This presumption arises in the following cases :—

(1) Where both the attesting witnesses are dead. In the case of a will which is produced after a lapse of more than 30 years when all the attesting witnesses who were illiterate and had put their marks of attestation were dead the Court may draw the presumption of due execution under sec. 90 of the Indian Evidence Act(m).

(2) Where the recollection of both the attesting witnesses is vague and doubtful.

(3) Where witnesses contradict one another or both of them state or one of them states facts showing that the will was not duly executed, (Mortimer on Probate p. 153). The mere fact that attesting witnesses have repudiated their signature does not invalidate the will, if it can be proved by reliable evidence (n). If the evidence is strong and satisfactory as to due execution, to outweigh it, it would be necessary to prove the improbability to be cogent and clearly made out(o). It is not necessary that each attesting witness should prove the same fact. One witness may depose to the signature and another may depose to the acknowledgment (p). If the evidence is conflicting it is the duty of the Appeal Court to have great regard to the opinion of the trial Judge (q).

64. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

Incorporation of papers by reference.

(This is sec. 51 of the Succession Act X of 1865. It applies to Hindus.)

Of the incorporation of papers referred to in a Will or Codicil.

When a testator refers in his will or codicil to any document, or mentions a previous will which is not legally executed, the question arises whether such document or will should be incorporated as forming a part of the will or codicil in which it is referred to. By sec. 64 it is enacted that if the testator in his will or codicil refers to any document *then actually written* as expressing any part of his intentions, such document shall be incorporated (r). Before a document can be incorporated the following conditions must be complied with :—

(1) The document must be of a testamentary nature (s).

(2) The document must be in existence at the date of the will or codicil in which it is referred to and described as existing. A paper not in existence at the date of the execution of the testamentary instrument cannot be incorporated in it or referred to for purposes of construction (t). In *In re Jones, Jones v. Jones*, (u) a testator directed his trustees to pay a legacy of £1000 to "T. College Investment Trustees appointed or to be appointed under the special declaration of trust for the benefit of T. College or otherwise as therein contained executed by

(m) *Mahendra Nath v. Netai Charan*, (1948) 1 Cal. 292; A. I. R. (1944) C. 241.

(n) *Brhamadat v. Chudan Bibi*, 20 C. W. N. 192.

(o) *Choley Narain v. Ratan Koer*, 22 Cal. 519 (P. C.).

(p) *Muktanath v. Jitendra*, 19 C. W. N. 1295.

(q) *Woomesh Chunder v. Rashmohini*, 21 Cal.

279; on appeal *Romesh Chunder v. Rajani Kant*, 25 I. A. 109; *Shunmugaroya v. Manikka*, 32 Mad. 400, (P. C.).

(r) *Mcosabhai v. Yacobbhai*, 29, Bom. 267.

(s) *Habergham v. Vincent*, 2 Ves. 228.

(t) *Singleton v. Tomlinson*, 3 App. C. 404.

(u) (1942) 1 Ch. 329.

me bearing even date with this my last will or any substitution therefor or modification thereof or addition thereto which I may hereafter execute" and it was held that the gift failed for uncertainty because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

- (3) The document must be clearly identified with the description of it given in the will (v).
- (4) The intention to incorporate must be clear (w). Halsbury's Laws of England, Vol. 14, p. 194.

Where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject of parol evidence, and if the document is described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it (x).

Whether incorporated documents should be included in probate.—The question whether documents not in themselves of a testamentary character but incorporated with the will should be included in the probate is mainly one of convenience. If the document is valid in itself independently of the will, it would seem that it need not be included in the probate, if there is a difficulty in procuring its production. If the document derives its validity from the will it ought, as a general rule, to be included (y). (Theobald on Wills, 7th Edn., p. 80.) The Court will not insist on including the incorporated paper in probate if the document is bulky or if it is in the hands of a third party and the Court has no power to order its production.

Effect of incorporation.—Incorporation of an instrument into a will does not alter the effect of the instrument so far as it is already valid. So far as it is invalid as an independent instrument it takes effect as a testamentary disposition subject to the ordinary rules as to lapse, ademption, etc., applicable to wills (z).

Examples

- (1) A makes a will which is invalid. Afterwards A executes a codicil beginning with the words, "This is a codicil to my last will and testament." It is proved that A had left no other will. *Held*: that the will was incorporated in the codicil(a).
- (2) A executes a codicil with the words, "This is a third codicil to my will." The codicil is invalid. Afterwards A executes another codicil beginning with the words, "This is the fourth codicil to will." Is the third codicil incorporated in the fourth codicil? No. There is no sufficient identification of the document(b).

NOTE.—Generally a duly attested a codicil to a will will incorporate the will if there is only one document in existence to which the term "will" can apply. A codicil to a prior unattested codicil will incorporate the unattested codicil(c). But a reference in a codicil to a will and prior codicils where there is a will and codicils duly attested, and *also other codicils not duly attested*, will only incorporate the will and the duly attested codicils(d) and similarly a reference by a codicil to a will only where there is a duly attested will and some unattested codicils will not set up the unattested codicils(e). (Theobald on Will 7th Edn. p. 68).

- (3) A by her will bequeathed her trinkets to be divided "as I shall direct in a small memorandum." On A's death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together. It is not proved that the memorandum was in existence at the date of the will but it is proved that it was written before the date of the last codicil which did not refer to it. *Held*: that the memorandum could not be incorporated(f).

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| <p>(v) <i>University College of North Wales v. Taylor</i>, (1908) P. 140; <i>Allen v. Maddock</i>, 11 Moo. P. C. 427.</p> <p>(w) <i>Habergham v. Vincent</i>, <i>supra</i>.</p> <p>(x) <i>Allen v. Maddock</i>, 11 Moore P. C. 427 at 454.</p> <p>(y) <i>Sheldon v. Sheldon</i>, 1 Rob. 81.</p> <p>(z) <i>Bizzey v. Flight</i>, (1876) 3 C. D. 269.</p> | <p>(a) <i>Allen v. Maddock</i>, 11 Moore's P. C. 427.</p> <p>(b) <i>Stockil v. Punshon</i>, L. R. 6 P. D. 9.</p> <p>(c) <i>Smith's case</i>, 2 Curt. 796.</p> <p>(d) <i>Croker v. Marquis of Hertford</i>, 4 Moo. P. C. 339.</p> <p>(e) <i>Utterton v. Robins</i>, 1 A. & E. 423.</p> <p>(f) <i>In the goods of Mathias</i>, 3 Sw. and Tr. 100.</p> |
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(4) A will made reference to a deed-poll which was executed at the same time, *Held*: that the deed-poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making its contents part of the will(g).

(5) A testator made a codicil to his will in 1845 which was attested by one witness and the day before his death he dictated a paper as "another codicil to my will" which was duly executed. *Held*: that the first codicil was incorporated, there being only one paper which came under the description codicil, and no other paper to which the testator could have referred(h).

(6) A will refers to two memoranda actually written but only one is found. Effect will be given to that which is found(i).

Secret Trust.—Apart from the question of incorporation of a document in a will or codicil there are cases when there is a bequest to a legatee upon trust but no trust appears on the face of the will, and questions arise as to how such a trust may be enforced? Such a trust may be orally communicated to the legatee or written in private memorandum executed by the testator. In such cases questions arise whether evidence of such a trust can be admitted and given effect to. In other words it may be asked first to what extent is it possible to give effect to the testamentary intentions that are not contained in the will itself and secondly can a testator reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, *i.e.*, can the testator be permitted to contravene the provisions of due execution and attestation of the will in this manner as laid down in section 63? The earlier cases decided before the English Wills Act, 1835, are *M'Cormick v. Grogan* (j); *In re Fleetwood* (k); *Pring v. Pring* (l) and *Smith v. Attersoll* (m). The principle laid down in these cases is, "that the doctrine of secret trust should be restricted within proper limits." The doctrine involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he undertook to perform. The doctrine is based on what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established. "A Court of conscience finds a man an absolute legal owner of a sum of money bequeathed to him under a valid will and it declares that on proof of certain facts relating to the motives and action of the testator it will not allow the legal owner to exercise his legal right to do what he will with his own. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires: he tells the proposed donee of this intention and either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intention will be carried out" per Viscount Sumner in *Blackwell v. Blackwell* (n).

The cases decided since the Wills Act proceed on the same principle of "fraud." *In re Fleetwood* (o), was followed in *In re Huxtable* (p). The doctrine of equity laid down in these decisions is that "for prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of

(g) *Gangabai v. Bhugwandas*, 29 Bom. 530 (P. C.), 32 I. A. 142.

(h) *Ingoldby v. Ingoldby*, (1846) 4 Notes of Cas. 493.

(i) *Dickinson v. Stidolph*, 11 C. B. N. S. 341.

(j) *L. R.* 4 H. 482.

(k) 15 Ch. D. 603.

(l) 2 Vern. 99.

(m) 1 Russ. 266.

(n) (1929) A. C. 318 at p. 334.

(o) 15 Ch. D. 594.

(p) (1902) 2 Ch. 793.

conscience directs and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual" (q). The limitations under which the doctrine is applied as laid down in these decisions are: (1) that the trust must be communicated to the legatee in the testator's life-time at, before or even subsequent to the execution of the will and codicil and (2) that there must be an acceptance of the trust by the legatee. In *In re Colin Cooper* (q)¹ a testator by his will gave a sum of money by way of secret trust to trustees to whom he had communicated the trusts in his lifetime. By a later additional testamentary disposition a further sum was given on the same secret trust to the same trustees but the trustees had no knowledge of the further gift until after the testator's death. It was held that the later gift failed.

Examples

(1) A by his will gave to five persons £12,000 upon trust to invest the same as they should think fit and apply the income "for the purposes indicated by me to them." The testator then gave parol instructions for his codicil to C one of the five persons and the object of the trust was communicated to all the five and accepted by them before the execution of the codicil. The codicil was then executed and it contained the following terms: "This is a codicil to the last will of me. I give and bequeath to my five friends (named) £12,000 . . . upon trust as they shall think proper and apply the income for the purposes indicated by me to them." C then made a memorandum of the terms of the trust as follows: "Re Mr. J. D. Blackwell. Memorandum of verbal instructions given to me at execution of codicil. Income of £12,000 to be paid to (name and address of the woman) or applied at the discretion of trustees for benefit of herself and her son (name mentioned) (Sd.) C. Held: that a complete, valid and consistent trust had been established by the codicil and memorandum(r).

(2) A appointed three executors of his will dated 11th August 1932 one of whom was E, a solicitor. By clause 5 he gave to E and another executor £10,000 to be held upon trust and disposed of by them among such persons or charities as might be notified by him to them or him during his life-time and in default of such notification to fall into his residuary estate. In 1928 A had made a will which was revoked by the will of 1932 and had then informed E, that he desired to provide for a person whose name was not to appear in the will. He then informed E, that the name and address of the intended beneficiary were written on a piece of paper enclosed in a sealed envelope which he handed to E, with direction to keep it unopened until after his death. The envelope remained in E's possession, no further communication of its contents being made. The testator died on 23rd April 1935. E then opened the envelope and found it contained "£10,000 to G." (giving the name and address of a lady). No other notification was given to E and the other executor named as a trustee was ignorant of the existence of the secret trust until after the testator's death. Held: G's claim failed as the trust had not been communicated(s).

In *Shenton v. Taylor*, (s)¹ the plaintiff alleged that the testator had communicated to his wife (defendant) his wish that she should pay to the plaintiff out of the testator's estate for life £ 2 a week, that the defendant promised the testator that she would pay the weekly sum and on the faith of that promise the testator gave all his property to the defendant by his will. The plaintiff pleaded that she was unable to give the particulars of the promise until discovery. The defendant denied the allegations. The plaintiff thereupon sought to administer the following interrogatories (1) Did your late husband communicate to you during his lifetime his wish that you should during the lifetime of the plaintiff pay to her or to some other and what person for her own use the weekly sum of £2 or some other and what weekly sum? (2) If yes, what was the date of such communication? (3) Did you not promise your late husband that you would during the lifetime of the plaintiff pay to her or to some other person and what person for her use the weekly sum of £2 or some other and what weekly sum? (4) If yes, what was the date of such promise? The lower Court held that the common law rule of evidence was that all communications between the husband and wife made during the

(q) *Blackwell v. Blackwell*, *Supra* at p. 335.
(q¹) (1939) 1 Ch. 580, (in appeal) (1939) 1 Ch. 811.

(r) *Blackwell v. Blackwell*, (1929) A. C. 318.

(s) *In re Keen's Estate*, *Evershed v. Griffiths*, (1937) Weekly Notes p. 61.
(s¹) (1939) 1 Ch. 620.

marriage were privileged and that the rule extended to the widow and upheld the defendant's contentions to decline to answer the interrogatories. But on appeal it was held that sec. 8 of the Evidence Act, 1853 in terms related only to husband and wife and not to widowers and widows or divorced person and the defendant was ordered to answer the interrogatories.

This rule of English equity is made applicable to India under sec. 5 of the Indian Trusts Act II of 1882 (*t*). In *Richard Taylor v. Raja of Parlakimedi* (*u*), a testator bequeathed certain property to a legatee and at the same time wrote a letter to the legatee containing directions how the property was to be disposed of, but the letter was not communicated to the legatee. The legatee died after the testator. It was held that the letter, not having been communicated to the legatee in the testator's lifetime, did not operate to create a trust and also that the letter was not admissible to show that the legatee was not intended to take a beneficial interest. The Court will impose a trust on a legatee only when there is fraud according to English law (*v*). In *Bayabai v. Haridas* (*w*), a testator in his will wrote as follows:—"In accordance with the directions that I am going to give in private to trustee No. I out of the trustees appointed by me my trustees should entrust to Haridas Rs. 5,000 out of my policy moneys and the shares of Tata Co., also should be transferred to the person whose name will be disclosed to Haridas." *Held*: Haridas was bound to disclose the private directions given to him by the testator and evidence was admissible. But if the secret trust is in respect of immovable property situate in British India it was held in *Maneckbai v. Meherbai* (*x*)¹ that the Statute of Frauds applied (this case was before the Transfer of Property Act), to Parsis and as the Trust was not in writing the plaintiff's claim was negatived.

The onus lies on the party setting up the secret trust to prove that it was communicated by the testator to the legatee and that the legatee agreed to accept the property bequeathed on the terms of the trust (*x*).

CHAPTER IV.

Of Privileged Wills.

65. Any soldier being employed in an expedition or engaged in actual warfare or an airman so employed or engaged or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.

Illustrations

(i) A, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(ii) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

(iii) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(iv) A, mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(t) *Manuel v. Jnana*, 31 Mad. 187.

(u) 32 Mad. 443.

(v) *Kali Charan v. Ram Chandra*, 30 Cal. 783.

(w) 40 Bom. 1.

(w¹) 6 Bom. 363.

(x) *Kali Charan v. Ram Chandra*, 30 Cal. 783.

(v) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

(This is sec. 52 of the *Succession Act X of 1865*. The words "or an airman so employed or engaged" are added by *Act X of 1927*. It does not apply to Hindus, etc.)

This Section is based on Sec. 11 of the English Wills Act.

Who can make a Privileged Will?—A privileged will can be made by a soldier or by an airman or by a mariner, if he has completed the age of 18 years when in actual military service. Under the English Statute a mariner in actual military service may make a privileged will. The word "soldier" includes army-surgeons (see *ill. (i)*). The words "actual warfare" means in actual military service, *i.e.*, on an expedition. A soldier who visited his solicitor and gave him instructions to prepare a will but was shot down before the will was prepared was not on actual military service when he visited his solicitor (*y*). The privilege is confined to those who at the time of making it are employed on an expedition or engaged in actual warfare.

A soldier, whilst in barracks or an airman on land, cannot execute a privileged will (*z*). In such cases he must execute his will according to the rules prescribed for executing unprivileged wills. But in *In the Estate of Spark (a)*, it was held that a soldier in camp in England who had made an oral will was in actual military service and the will was valid.

"Mariner" means a seaman and includes the whole service from cook to captain (*b*), also in the navy (*c*), and also merchant seamen (*d*). In order to be privileged the mariner must be "at sea," which means the time he goes on board (*e*), *i.e.* "on maritime service" whether on sea or on board a vessel in a river or in port, (*f*). A sailor on shore cannot execute a privileged will.

Mode of making,
and rules for execut-
ing, privileged
wills.

66. (1) Privileged wills may be in writing, or may be made by word of mouth.

(2) The execution of privileged wills shall be governed by the following rules:—

(a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

(c) If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.

(y) *In the Estate of Anderson*, (1948) W. N. 232; 1944 P. 1.

(z) *Drummond v. Parish*, 3 Curt. 522; *Re Hill*, 1 Rob 276.

(a) (1941) W. N. 173; 1941 P. 115.

(b) *In Re Hayes*, 2 Curt. 338.

(c) *In Re Saunders*, L. R. 1 P. & D. 16.

(d) *Morrell v. Morrell*, 1 Hagg. 51.

(e) *The Earl of Euston v. Seymour*, 2 Curt. 339, 3 Curt 530; *In the goods of Lay*, 2 Curt. 375; *In the goods of Mc. Murdo*, L. R. 1 P. & D. 540.

(f) *Inbonis Austen* 2 Rob, 611.

(d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(e) If the soldier, airman or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.

(f) If the soldier, airman or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

(g) The soldier, airman or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

(This is sec. 53 of the Succession Act X of 1965. In clause (h) the words "being still alive" are added. The word "airman" in clause (e) (f) and (g) has been added by Act X of 1927. This section does not apply to Hindus, etc.)

Execution of Privileged Wills.—A privileged will may be either *verbal* or *written*.

If it is **verbal**, it must be declared before *two witnesses* present at the same time.

A verbal will shall be null and void at the expiration of one month after the soldier, airman or mariner shall have ceased to be entitled to make a privileged will.

If the Will is in **writing**, the following rules apply :—

	<i>Written by whom.</i>	<i>Signature of testator.</i>	<i>Attestation.</i>
Rule (1)	By the testator wholly.	Not necessary.	Not necessary.
Rule (2)	By another person, wholly or in part.	Necessary.	Not necessary.

NOTE.—If it is not signed by the testator it will be necessary to show that it was written by the testator's direction or that he recognised it as his will.

Rule 3.—If the soldier, airman or mariner leaves *written instructions* for his will but dies before the will is prepared and executed, such instructions shall constitute his will.

Rule 4.—If the soldier, airman or mariner gives *verbal instructions* to prepare his will in the presence of *two witnesses* and the instructions are *reduced to writing* in his lifetime but he dies before the will is prepared and executed, such instructions shall constitute his will, although the instructions may not have been reduced into writing in his presence nor read over to him. An entry regarding the disposal of a soldier's estate in a kindred roll kept by military authorities is not a will (g).

Duration of Privileged Will:—Under the English Statute the privileged will remains operative unless expressly revoked, although the maker of the will dies long after he has ceased to be entitled to make a privileged will. But under clause (h) of this section a nuncupative will becomes null and void at the expiration of one month after the testator has ceased to be entitled to make a privileged will.

CHAPTER V.

Of the Attestation, Revocation, Alteration and Revival of Wills.

67. A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person or any person claiming under either of them.

Explanation.—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

(This is sec. 54 of the Succession Act X of 1865. It does not apply to Hindus, etc., but is made applicable to the wills and codicils of Taluqdars of Oudh by sec. 19 of the Oudh Estates Act 1869(h).

This Section is based on sec. 15 on of the English Wills Act

Of Attesting Witnesses.—Any person is competent to attest a will. Even a minor can be an attesting witness, see sec. 118 Indian Evidence Act. It is not necessary that he should know the contents of the will which he is attesting. Mere attestation is not enough to involve the witness with the knowledge of the contents of the will (i). He merely witnesses the signature of the testator. The executor named in the will is competent to attest and also a legatee or a beneficiary. But any legacy or bequest given to a person who attests the will, or to his wife or her husband, or to any person claiming under either of them shall be null and void. The word "thereby" means "by the same instrument which is attested" and indicates that it is only the benefit given by the particular instrument attested that is avoided. Such an attesting witness is competent to the execution of the will. Under sec. 16 of the English Wills Act if the testator directs a debt to be paid to any creditor and the will is attested by the creditor, such creditor can be admitted a witness to prove the execution of such will or to prove the validity or invalidity thereof. In *Shiam Sunder v. Jagannath*, the will contained the following clause, "I have executed this will with the consent of all my sons and have got them to sign it as witnesses so that the will may be acted upon fully and

(g) *Bhagubai v. Appaji*, 47 Bom. 552.

(h) *Shiam Sunder v. Jagannath*, 80 Bom. L. R. 110 (P. C.)=A. I. R. (1925) Oudh 465 affirmed by P. C. A. I. R. (1927) P. C.

248=32 C. W. N. 303.

(i) *Rajammal v. Sabapathi*, (1945) M. L. J. 397 P. C.

they may not quarrel after my death." The sons appended their signatures. It was held that they were not attesting witnesses and the bequest in their favour was not void. A gift, however, to an attesting witness as trustee is not void (j).

Sec. 67 does not apply to Hindus. Hence the attesting witness to the will of a Hindu does not lose the legacy given to him by the will.

Examples

(1) A by his will gives a legacy of Rs. 1,000 to B who is one of the attesting witnesses. The will is valid but B is not entitled to receive Rs. 1,000.

(2) A executes a will which is attested by B and C. A legacy of Rs. 1,000 is bequeathed to D who is B's wife and another of Rs. 1,000 to E who is C's son. The will is valid. The legacy to E is also valid but the legacy to D is void. A bequest to the son of an attesting witness made independently and not as a person claiming under the attesting witness is not void (k).

(3) A executes a will which is attested by B and C. A legacy of Rs. 1,000 is bequeathed to B. A dies. Then B dies without receiving the legacy leaving E as his heir. E cannot get the legacy as he claims under B.

(4) A left a will giving a legacy to B who is an attesting witness. A afterwards executes a codicil confirming the legacy to B to which codicil B was not an attesting witness. B is entitled to the legacy by virtue of the codicil (l).

(5) A left a will giving a legacy to B. The will is attested by C and D. Subsequently A executes a codicil confirming the will which is attested by B and C. B does not lose his legacy by attesting the codicil. (Explanation to Sec. 67.)

(6) A executes a will which is attested by B, C and D. A legacy of Rs. 1,000 is given to D. D cannot take the legacy, though without him there was the full number of witnesses (m). In such a case the Court will take evidence to explain as to why the signature of a third person was written and if it is satisfied that it was not written with the intention of attesting the signature of the testator such legatee's signature will be omitted from the probate and the legatee will get his legacy (n).

(7) A by his will gives Rs. 10,000 to B for life and after B's death to B's children equally. B attests the will. The gift to B for life is bad. But B's children will take an immediate interest in Rs. 10,000 and the same will be divided amongst them equally (o).

(8) A by his will gives Rs. 1,000 to B. The will is attested by C and D. B afterwards marries C. Is the legacy of Rs. 1,000 to B void? No. Marriage after attestation does not affect the bequest or legacy (p).

(9) A will is attested by a solicitor. The will allows the solicitor to make professional charges for the work which he may do in respect of the estate of the testator. The solicitor loses his professional charges (q).

(10) A, a Hindu, executes a will containing a clause for the benefit of the solicitor who prepared and attested the will. Does the solicitor lose the benefit? No. Sec. 67 of the Act does not apply to Hindus. Accordingly, an attesting witness of the will of a Hindu governed by the Hindu Wills Act does not lose any legacy thereby bequeathed to him (r).

(11) A bequeaths his property to his wife for life and after her to his three children X, Y and Z or the survivors equally and there was a residuary clause in favour of the wife. X attested the will. After the widow's death Y filed a suit that X was incapable of taking and that the property be divided between Y and Z. Held: share of X lapsed but it fell into the residue and did not accrue to Y and Z (s).

Incapacity of persons to take the legacy:—Apart from the question of the persons attesting a will being incapable of taking the legacy there is one other exception. A person who murders, the testator cannot take the legacy

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| (j) <i>Cresswell v. Cresswell</i> , 6 Eq. 64; <i>In re Ray's Wills Trust</i> (1936) 1 Ch. 520. | 661. |
| (k) <i>Mrs. I. E. Moore v. E. M. Turner</i> , A. I. R. (1937) L. 292. | (o) <i>In Re Townsend's Estate</i> , L. R. 34 Ch. D. 357. |
| (l) <i>Anderson v. Anderson</i> , 18 Eq. 381. | (p) <i>Thorpe v. Bestwick</i> , L. R. 6 Q. B. D. 311. |
| (m) <i>Administrator-General v. Lazar</i> , 4 Mad. 244. | (q) <i>Re Pooley</i> , 40 Ch. D. 1. |
| (n) <i>In the goods of Sharman</i> , L. R. 1 P. & D. | (r) <i>Bai Gangabai v. Bhugwandas</i> , 29 Bom. 580. |
| | (s) <i>Camani v. Barefoot</i> , 26 Mad. 438. |

under the testator's will. This is on the ground of public policy. (See Halsbury's Laws of England, Vol. 34, p. 46). This principle also applies to intestacy and a murderer is deprived of his share in the intestate's estate. In such a case the view is to treat the murderer as non-existent and to distribute the estate accordingly^(t).

Witness not disqualified by interest or by being executor.

68. No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

(This is sec. 55 of the Succession Act X of 1865. It applies to Hindus, etc.)

This section is based on sec. 17 of the English Wills Act.

This is a corollary to the last section. An executor appointed by the will is a competent attesting witness and there is no objection to his proving the will and acting as an executor. He, however, will lose any benefit given to him under the will although such a benefit will be in the shape of salary or remuneration for his trouble for managing the estate. An executor by tenor also stands on the same footing.

69. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Revocation of will by testator's marriage.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

(This is sec. 56 of the Succession Act X of 1865. This section does not apply to Hindus, etc.)

This section is based on sec. 18 of the English Wills Act.

Revocation by Operation of Law.

By section 62 a will is liable to be revoked at any time by the maker of it. This section lays down that if a maker, whether man or woman, of a will marries afterwards, the will is revoked. This is revocation by operation of law. The principle upon which a will is revoked by marriage is, that marriage creates such a change in the testator's condition, such new obligations and duties, that they raise an inference that the testator would not adhere to a will made previous to marriage.

Every will whether unprivileged or privileged is revoked by marriage of the maker. It is not only the first marriage but any subsequent marriage. A will made subsequently to the first marriage but previously to the second marriage in the lifetime of the first wife was held to be revoked^(u).

In England the law has been changed after 31st December, 1925 by the law of Property Act, 1925 (15 Geo. V c. 20, sec. 177) which provides that "a will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section 18 of the Wills Act, 1837 or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated."

(t) *In re Sejstworth*, W. N. (1934) P. 187; *In re Pitts*, (1931) 1 Ch. 546; *Bedford v. Bedford*,

(1985) 1 Ch. 89.

(u) *Gabriel v. Mordakai*, 1 Cal. 148.

This Statute lays down two conditions : (1) that there must be in the will an express reference to the marriage contemplated and (2) that there must be a solemnization of the marriage after the execution of the instrument (v). A general statement that the will is made in contemplation of marriage is not sufficient (w).

This section speaks of "will" only, but the word includes a "codicil" also. (See General Clauses Act, sec. 3 (57).)

Foreigners.—In *Loustelan v. Loustelan* (a) a French woman while residing in England executed a will in England which was valid according to French law. Subsequently she married a Frenchman and continued to reside in England until her death. It was held that on her marriage the wife acquired the domicile of her husband which was French and the will was governed by French law and was not revoked by her marriage.

Exceptions.—(1) A will made in exercise of a power of appointment is not revoked by the marriage of the maker when the property over which the power of appointment is exercised would not in default of such appointment pass to his or her executor, or administrator or to the person entitled in case of intestacy, e.g.—

(a) A has power to appoint certain property by will to any person he likes. A by a will appoints the property to B. A then marries. The will is revoked, because if A had died without executing the power (i.e., in default of appointment) the property would have gone to A's executors or administrators or to the person entitled in case of intestacy.

(b) A has power to appoint certain property by will to such of the children of B as A likes, and in default of appointment the property is to go to all the children of B in equal shares. A makes a will and exercises the power in favour of one of the children of B. A then marries. The will is not revoked because if A had not exercised the power the property would have gone to all the children of B. The reason is that a revocation of the will if permitted would operate only in favour of those entitled in default of appointment and the new family of the testator would not derive any benefit.

(2) Where two persons make mutual wills, the marriage of one of them does not revoke the will of the other(y).

(3) As sec. 69 does not apply to Hindus, a will made by a Hindu is not revoked by his marriage(z).

(4) The will of a Mahomedan is not revoked by his marriage. But as sec. 69 applies to Parsis, the will of a Parsi is revoked by his marriage.

(5) There is no revocation where the marriage is void, e.g., with a deceased wife's sister(a). In *Warter v. Warter*(b), Taylor obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on 27th November 1879. The divorced wife was married to Colonel Warter on 3rd February 1880, i.e., within six months from the date of decree. Three days later Colonel Warter made a will in favour of his wife. The marriage of 3rd February 1880 having been performed within six months from the date of decree was void under the Indian Divorce Act. In April 1881 on the advice of a solicitor Colonel and Mrs. Warter were remarried at a registry office. Colonel Warter having died without re-executing his will or making another, the question arose whether the marriage of April 1881 revoked the will. It was held that the marriage of February 1880 was null and void and therefore the marriage of April 1881 was valid and revoked the will(c).

(v) *Pilot v. Gainfert*, (1981) 2 K. B. 108= 1981 P. 108.

(w) *Sallis v. Jones*, (1986) P. 43.

(x) 81 L. T. 459.

(y) *Hinckley v. Simmons*, 4 Ves. 160.

(z) *Subba Reddi v. Doraisami*, 30 Mad. 369.

(a) *Mette v. Mette*, 1 Sw. and Tr. 416.

(b) (1890) L. R. 15 P. D. 152.

(c) *Jackson v. Jackson*, 34 All. 208.

Explanation.—Powers of appointment are of two kinds, either general or special. A general power of appointment is a right to appoint to whomsoever the donee, *i.e.*, the person invested with the power, pleases. He can appoint to himself. In the case of a special power of appointment the donee is restricted to some objects designated in the instrument creating the power.

70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Revocation of
unprivileged will or
codicil.

Illustrations

(i) A has made an unprivileged will. Afterwards, A makes another unprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

(This is sec. 57 of the Succession Act X of 1865. It applies to Hindus except that marriage shall not have effect of revoking a will. See Schedule III, cl. (4).)

This section is based on sec. 20 of the English Wills Act. Under sec. 19 of the English Act there is no presumption of revocation on the ground of an alteration in circumstances. Sec. 70 is wide enough to include this provision of the English Statute.

The methods of revocation contained in this section are exhaustive(d).

Revocation of will is divided into two parts by this section—(a) by operation of law (*i.e.*, by marriage) and this subject is fully dealt with in section 69 and (b) by acts of parties (*i.e.*, by another will or codicil, or by some other writing, or by burning, tearing or otherwise destroying). The modes of revocation as prescribed in this section are exhaustive. This Act has not adopted the principle that a will should be deemed to be revoked in consequence of the change in circumstances of the testator or by his change of domicile or a change with respect to his rights to the property he disposes of(e).

Revocation by Act of Parties

(1) By another Will or Codicil.—This follows from the ambulatory nature of the will, that the *last* testament shall be operative to the exclusion of previous contrary or inconsistent ones. But the intention to revoke a former will must be clear, *e.g.*, when the later instrument contains words of express revocation; a general revocatory clause revoking all former wills and codicils is usual in all well drafted wills. Where the later instrument contains no words of express revocation but the dispositions made in the later instrument are of such a character as cannot stand with the first it can be inferred that the testator intended to revoke the first(f). Although the maxim is that no man can die with two testaments, the mere fact of making a subsequent will does not necessarily revoke the

(d) *Surendra v. Sidas*, 35 C. L. J. 488.

(f) *Sahib Mirza v. Umda Khanam*, 19 Cal

(e) *Bodi v. Venkataswami*, 38 Mad. 369;

444, 19 I. A. 83.

Subba Reddi v. Doraisami, 30 Mad. 369.

former ones unless the subsequent will expressly or in effect revokes all former wills or the two are inconsistent and incapable of standing together(g). A man may die leaving two or several wills and both or all of them will be entitled to probate if they are not inconsistent with each other, provided they are all clearly testamentary and they may all be admitted to probate as together containing the last will of the deceased(h). It is a misnomer to say that a man has died leaving two wills. He does leave and can leave but one will(i). If the two wills are not inconsistent they cannot be considered as two separate wills but the two together must be considered to indicate the testamentary intention of the deceased(j). If the subsequent will is partly inconsistent with the one of an earlier date, the latter is only revoked as to those parts where it is inconsistent and both are entitled to probate. The mere use of the words "This is my last will" does not necessarily import a revocation of all previous wills(k). Even the words "This is the last and only will" were held not to make the instrument a revocatory one(l). In *In re Hawksley's Settlement, Black v. Tidy*(m), a testatrix made a will in 1922. In 1927 she made a second will which referred to a "cancelled will" which it was admitted referred to the will of 1922. The 1927 will was described as "the last will and testament of, etc." It was held that the description of the will of 1927 as "the last will and testament" and the reference to the "cancelled will" were not by themselves sufficient to effect a complete revocation of the earlier will and both were admitted to probate. But as the will of 1927 rendered the whole of the provisions of 1922 will ineffective the latter took effect but in so far as they were mere repetitions they took effect under the previous will. In all cases evidence as to intention to revoke must be clear. The question whether a will has been revoked by a subsequent instrument depends entirely upon the intention of the testator as expressed in that instrument. The rule in *Baker v. Story*(n), that a second will will revoke an earlier one is no longer law since the decision in *Ward v. Van der Loeff*(o). A codicil revoking a will does not necessarily revoke a prior codicil(p). Formerly a revocation of the will was an implied revocation of the codicil but now a codicil to a will is not revoked by the revocation of the will(q).

Where there are two inconsistent wills, both of the same date or undated, both are void for uncertainty(r). But in such cases it is the duty of the Court to try to reconcile them if possible(s).

A subsequent will or codicil made under the impulse of mistaken notion of facts will not revoke a former one. But in such cases it must be proved that the impulse was the foundation of his wish to change his former intent, e.g., a bequest is made to A and afterwards by another will, without destroying the first, the same bequest is made to B stating her to be his wife, but B had a husband living of which fact the testator was deceived. In such a case the second will will not operate as a revocation of the former will. See also *Chrosthwaite v. Dean*(t). A testator gave legacies to the grandchildren of his sister, and afterwards by a codicil revoked the legacies, giving as a reason, that the legatees were dead. It was proved that the legatees were not dead. Held that the legacies were not revoked as the cause of revocation was false(u).

(g) *Lemage v. Goodban*, L. R. 1 P. & D. 57.

(h) *In the goods of Budd*, 3 Sw. and Tr. 196.

(i) *Douglas-Menzies v. Umphelby*, (1908) A. C. 224.

(j) *Shemil v. Ahmed Omer*, 33 Bom. L. R. 1056.

(k) *Cutto v. Gilbert*, 9 Moo. P. C. 181.

(l) *Simpson v. Faxon*, (1907) P. 54.

(m) (1984) 1 Ch. 384.

(n) (1874) 81 L. T. 131.

(o) (1924) A. C. 653; see *Robinson v. Robin-*

son, (1930) 2 Ch. D. 332.

(p) *Farrer v. St. Catherine's College*, 16 Eq. 19.

(q) *In the goods of Savage*, L. R. 2 P. & D. 78; *In the goods of Turner*, L. R. 2 P. & D. 403.

(r) *Townsend v. Moore*, (1905) P. 66.

(s) *Raikishori v. Debendranath*, 15 Cal. 409 (P. C.)

(t) 5 Eq. 245.

(u) *Campbell v. French*, 3 Ves. 322; *Doe v. Evans*, 10 A. & E. 288.

A will is not to be treated as revoked either wholly or in part by a will which is not forthcoming unless it is proved by satisfactory evidence that the will contained a revocatory clause or that its dispositions cannot stand with the existing will(v).

The words "nor any part thereof" indicate that a part of the will may be revoked in the manner prescribed in this section. Where a part of the will is destroyed whether it operates as a revocation of the whole or only *pro tanto* depends upon the intention with which the act is done. Thus the destruction of a clause at the commencement of a will or cutting out various legacies or a clause appointing executor has been held not to revoke the rest(w). In *Kedar Nath v. Sarojini*(x) a will was written on two sheets of paper and only first sheet was found. Probate was granted of a portion of the will to the extent to which the contents were proved.

(2) By some Writing declaring an *intention* to revoke and executed in the manner in which an unprivileged will is required to be executed, *i.e.*, the writing must be signed by the testator and attested by two witnesses. It need not be testamentary. This is cancellation of will. Ordinarily a will is cancelled by drawing lines across it and also by cancelling the signature and of the attesting witnesses. But that is not enough if the will is not torn. The cancellation must be signed by the testator and attested by two witnesses(y).

Revocation of Codicil.—A codicil means an instrument in relation to a will and forms a part of the will, (see definition in sec. 2). The questions arise whether the revocation of the will operates as revocation of the codicil by implication. Under the provisions of this section it is now settled that a codicil is not deemed to be revoked merely by implication of the revocation of the will, but the codicil will remain effectual unless it is shown that the testator while intending to revoke the will also intended to revoke the codicil as well.

(3) By **Burning or Tearing** the will by the testator or by some person *in his presence and by his direction* with the *intention* of revoking the same. To constitute "burning" it is not necessary that the instrument should be consumed; but there must be actual burning of the will to some extent as to destroy the entirety of the will(z). Thus, if the testator obliterates his own signature or that of the attesting witnesses with the intention of revoking the will or cuts off his signature, that would amount to a complete revocation(a). The act of burning, tearing or destroying the will by a third person must take place in the presence of the testator and must be by his directions(b). The word "tearing" does not mean tearing to pieces, the slightest act of tearing with intent to revoke is sufficient(c). Cutting is equal to tearing. Obliterating and tearing off the names of the attesting witness is sufficient to revoke the will(d). There must in all cases be the *animus revocandi* and the act of burning or tearing must be completed. Both must concur in order to constitute a legal revocation. If the act of destruction is inchoate and incomplete it will not amount to a revocation(e). Evidence is not admissible to prove that the testator had said that he had torn up the will(f). Actual destruction or formal revocation in writing was held not essential to constitute revocation of a Hindu will under the Hindu Wills Act(g).

(v) *Sahib Mirza v. Umda Khanam*, 19 I. A. 83.

(w) *In the goods of Woodward*, 2 P. & D. 206; *In the goods of Nelson*, 6 Eq. 569.

(x) 26 Cal. 634.

(y) *Cheese v. Lovejoy*, L. R. 2 P. D. 251; *Kharsedji v. Kekobad*, 52 Bom. 653.

(z) *Hobbs v. Knight*, 1 Curt. 768.

(a) *In the goods of Lewis*, 1 Sw. & Tr. 81.

(b) *In the goods of Dadds*, Dea. & Sw. 290.

(c) *Johur Lal v. Dharendra*, 23 C. L. J. 314=

20 C. W. N. 304=34 Ind. Cas. 707.

(d) *In bonis James*, 7 Jur. N. S. 52.

(e) *Raja Chelikani v. Raja Chelikani*, 29 I. A. 156.

(f) *Shib Sabitri v. Collector of Meerut*, 29 All. 82; *Keen v. Keen*, 3 P. & D. 105; *In the estate of Mackenzie*, (1909) P. 305.

(g) *Chelikani v. Chelikani*, 7 C. W. N. 1 (P.C.); 29 I. A. 156.

The revocatory acts, if done by a third person by the testator's directions, must also be done in his presence. A will burnt by the testator's order but not in his presence is not revoked.

Striking through the will or the signature of the testator with a pen is not sufficient to revoke his will (h).

(4) **"Otherwise Destroying."**—The words "otherwise destroying" denote modes of destruction *ejusdem generis* with those described as "burning", "tearing" etc. Cancellation of will is not one of the methods of revocation. Where a will is written on several sheets of paper and each sheet signed and attested, tearing off the last signature will revoke the whole will (i). (See Halsbury's Laws of England Vol. 34, p. 86, foot-note (b).)

A will may be revoked in part, *e. g.*, where a clause is cut off (j).

Cancellation :—The cancellation of a will by drawing lines across it is not one of the modes of revocation. (See examples 5 and 7 given below) Even the words "the last will and testament" and the reference in it to the "Cancelled Will" will not by themselves be sufficient to effect complete revocation (k).

Examples

(1) A, whilst delirious tears up his will into pieces. The pieces are preserved. On recovering A is informed of what he had done, and he said he would make a fresh will. A dies without making a fresh will. The will is not revoked. A had no *animus revocandi* when he tore up the will(l).

(2) A, being moved with a sudden impulse of passion against a devisee under his will, conceived the intention of cancelling it. Having torn the will twice through his arms were arrested and his anger mitigated by the submission of the devisee. He then fitted the pieces together and said, "It is a good job, it is no worse." *Held*: there was no revocation of the will(m).

(3) A says in the presence of B and C, "I revoke my will." The will is not revoked. A will cannot be revoked orally.

(4) A residing at Poona writes to B, his solicitor in Bombay, to destroy his will. B destroys it. The will is not revoked and probate will be granted of the draft copy. The destruction must be in the presence of the testator(n).

(5) J a lady makes her will on 5-6-1919 and keeps it for safe custody with her attorneys. In April 1926 she sends for her will and draws two cross lines on the first page and on the top of that page she writes "This will is cancelled" and puts her signature. The rest of the will is not cancelled. J died in 1927 and the executors applied for probate. The sons of J filed a caveat contending that the will was cancelled. *Held*: that the will was not revoked and probate was granted(o).

(6) A erases his signature and writes it again in a better way, but not in the presence of the attesting witnesses. The will is not revoked as A had not the *animus revocandi*.

NOTE.—Revocation is in all cases a question of intention, and if the act done, though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than revocation, it will not revoke the instrument. (Theobald on Wills, 7th Edn. p. 42).

(7) A testator draws lines across his will and writes on the back of it, "This is revoked." The will is not revoked. The writing must be signed by the testator and attested by two witnesses(p).

(8) A testator writes at the foot of his will a memorandum to the effect that "This will was cancelled this day." The memorandum is signed by the testator and attested by two witnesses. The will is revoked(q).

(h) *Stephens v. Tapprell*, 2 Curt. 458.

(i) *In Re Gullan*, 1 Sw. & Tr. 23; see also

Kedar Nath v. Sorajini, 3 C. W. N. 617.

(j) *Clarke v. Scripps*, 2 Rob. 563.

(k) *In Re Hawksley's Settlement*, (1934) 1 Ch. 384.

(l) *Brunt v. Brunt*, L. R. 3 P. & D. 37.

(m) *Doe v. Perkes*, 3 B. & A. 489.

(n) *In the goods of Dadds*, Dea. and Sw. 290.

(o) *Kharsetji v. Kekobad*, 52 Bom. 653; 30 Bom. L. R. 476; 109 I. C. 742, A. I. R. (1928) B. 194.

(p) *Cheese v. Lovejoy*, L. R. 2 P. & D. 251.

(q) *In the goods of Fraser*, L. R. 2 P. & D. 40.

Lost Will.—Where a will duly executed, and traced to the testator's possession and last seen there is not forthcoming on his death, the presumption is that it was destroyed by himself for the purpose of revocation (*r*). This is the rule in *Welch v. Phillips* (*s*). In applying this rule in India considerable caution should be used in view of the habits and conditions of the Indians (*t*). To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi* (*u*). The presumption will be the same if the will is found mutilated or defaced (*v*). But if a will duly executed is destroyed in the lifetime of the testator without his authority or after his death, it may be established upon satisfactory proof being given of its having been so destroyed and also of its contents (*w*). Mere loss of the will does not operate as revocation (*x*). To establish revocation destruction by the testator must be shown (*y*). It is not justifiable to infer revocation from the mere fact that the original is not to be found and is not forthcoming after the death of the testator (*z*). If one portion of the will is lost, probate can be granted of the portion to the extent to which the contents are proved (*a*).

Doctrine of Dependent Relative Revocation.—When a testator destroys his will or codicil with the intention of setting up a previous will or codicil executed by him, the *animus revocandi* or the intention to revoke is a conditional one, the condition being the validity of the document intended to be set up. If, therefore, the document intended to be set up is not a legal one, *e. g.*, if it is not validly executed, the original will is not revoked. This is generally known as the doctrine of dependent relative revocation. The doctrine of dependent relative revocation will apply in all cases where the intention of the testator is to set up another will. It is not necessary for this purpose that at the time of the revocation of the subsequent will there should be in existence an earlier valid will which the testator intends to revive. The doctrine will apply where there is an intention to execute a fresh will. (See Halsbury Vol. 34, p. 88). In the *Goods of Hope Brown*, (*b*) the testator made a will in 1934, which was prepared by solicitors and whereby he disposed of all his property. In 1939 the testator executed a holograph will whereby he revoked all previous testamentary dispositions made by him and made certain provisions for his wife but there was no disposal of the residue. The will of 1939 contained the usual revocation clause. The widow of the testator applied to the Court for grant of probate of both the wills. It was held that the testator inserted the revocatory clause in the second will conditional on concluding that will, and as he failed to conclude it, the best effort should be made to give effect to his testamentary disposition and to admit the second will to probate with the first will omitting the revocatory clause in the second will. Whilst giving judgment Langton, J., observed that the whole doctrine of dependent relative revocation rested on the word "conditional" *viz.*, that the revocatory clause is inserted conditionally, the condition being that a new will should be set up by the document in which the revocatory clause appears. The new matter that this case introduced is whether it is possible to say that the revocatory clause is conditional when part of the document in which it is included is good and should be admitted to probate. His Lordship felt no doubt that the revocatory clause in the second will was inserted by the testator because he wanted

- (*r*) *Anwar Hossein v. Secretary of State*, 31 Cal. 885; *Aditram v. Bapulal*, 45 Bom. 906; *Sarat Chandra v. Golap Sundari*, 18 C. W. N. 527; *Santu v. Maiku*, A. I. R. (1940) A. 175; *Harilal v. Sarat Chandra*, 43 C. W. N. 824.
 (*s*) 1 Moo. P. C. 299.
 (*t*) *Padman v. Hanwanta*, 19 C. W. N. 929 (P. C.).
 (*u*) *Allan v. Morrison*, (1900) A. C. 104.

- (*v*) *Lambell v. Lambell*, 3 Hagg. 568.
 (*w*) *Trevelyan v. Trevelyan*, 1 Phillim. 149; *Sugden v. Lord St. Leonards*, (1870) 1 P. & D. 154.
 (*x*) *Babulal v. Baijnath*, 24 Pat. 395.
 (*y*) *Sarat Chandra v. Golap Sundari*, *supra*.
 (*z*) *Srinivasa v. Tirunarayan*, 44 My. H. C. R. 957; *Cutto v. Gilbert*, 9 Moo. P. C. 131.
 (*a*) *Kedar Nath v. Sarojini*, 26 Cal. 624.
 (*b*) (1942) W. N. 148; (1942) P. 136.

to get rid of the first will and to give full priority to the second will but as he did not succeed in concluding his second will the condition was not fulfilled and therefore both the wills were admitted to probate omitting the revocatory clause in the second. The application of the doctrine is a question of intention which has to be ascertained from the language of the testator as found in his will (c). It is a question of construction and is the function of the Probate Court, (Halsbury's Laws of England, Vol. 34, pp. 88-89). Unless and until the first document or writing is effectually revived there can be no revocation of the subsequent will. "Where it was evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, if the instrument cannot have that effect it shall not be a revocation" (d). In order that the doctrine of relative revocation may apply the act of destruction must be referable wholly and solely to the intention of setting up some other testamentary paper, and that testamentary paper is effectually revived, e.g., if a testator executes a will on several sheets of paper and afterwards takes out one sheet and substitutes another in its place which is not signed or attested the doctrine will not apply and probate will be refused of the whole will (e). If in the later will there is no revoking clause the doctrine of dependent relative revocation cannot be invoked (f).

Examples

(1) A makes a will in 1862 which is unattested and a second will revoking the first in 1864 which is duly attested. In 1865 he destroys his will of 1864, his object being to set up the will of 1862. As the will of 1862 is not attested and therefore could not be set up, the second will is not revoked.

(2) A intending to make a new will revokes a will already made. A dies without making a new will. The revocation is complete. In order that the doctrine of dependent relative revocation may apply there must be the intention to set up a will *already* existing, and not a new will to be executed (g).

(3) A obliterates the amount of legacy and writes over it another amount. These interlineations and obliterations are not initialled in the margin according to the requirements of sec. 71. They are, therefore, void and the original bequest will take effect (h). But if the name of the legatee is obliterated and another written over it, no case of dependent relative revocation will arise.

(4) A legacy is given by will to A, and by a codicil the legacy to A is revoked, and the same legacy is given to B. B predeceases the testator. The legacy to A is nevertheless revoked. In such a case no case of dependent relative revocation arises as there is nothing to show that the legacy to A was only to be revoked if the legacy to B was effectually made (i).

Evidence of Revocation.—The intention to revoke the will may be proved by parol evidence. Declarations of the testator that he had destroyed the will are not admissible to prove the fact of destruction but they are admissible to prove his intention to revoke it from which the fact of destruction may be inferred. If a will is found torn after the death of the testator, and there is no direct evidence whether the will was destroyed by the testator *animus revocandi*, the presumption would be that it was destroyed by the testator *animus revocandi*, (Halsbury Vol. 34, p. 87). Evidence is not admissible to prove that the testator had said that he had torn up the will (j).

Hindus.—By Schedule III, section 70 is applied to Hindus but it is provided that in applying this section the words "than by marriage" shall be omitted. A will of a Hindu etc., is not revoked by marriage. A will of a Hindu, Jain, Sikh,

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| (c) <i>Venkatanarayana v. Subbammal</i> , 43 I. A. 20=39 Mad. 107 (P. C.). | (g) <i>Williams v. Tyley</i> , (1859) Johns. 529 but see <i>contra</i> <i>Dixon v. Solicitor to the Treasury</i> , (1905) P. 42. |
| (d) <i>Ex-parte Ilchester</i> , 7 Ves. 379. | (h) <i>Brooke v. Kent</i> , 3 Moo. P. C. 334. |
| (e) <i>Woodward v. Gouldstone</i> , 11 App. Ca. 469 at 477; <i>Trelgar v. Lean</i> , 14 P. & D. 49; <i>Ker v. Meakin</i> , 20 Bom. 370. See <i>Powell v. Powell</i> , (1866) L. R. 1 P. & D. 209. | (i) <i>Tupper v. Tupper</i> , 1 K. & J. 665. |
| (f) <i>Rambharan v. Gobinda</i> , 40 C. L. J. 321. | (j) <i>Shib Sabitri v. Collector of Meerut</i> , 29 All. 82. |

etc., must be revoked in the manner laid down by this section, *i.e.*, (1) by another will or codicil, or (2) by some writing or (3) by burning, tearing or otherwise destroying and these modes are exhaustive (*k*). Previously the will of a Hindu not governed by the Hindu Wills Act could be destroyed orally (*l*) but this is no longer permissible since the amendment of sec. 57 by Act XVIII of 1929.

Cutchi Memon :—A will of a Cutchi Memon can be revoked by any definite expression of a present intention to revoke it. But a mere expression of an intention to revoke a will at some future date does not amount to revocation (*m*).

71. No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will :

Effect of obliteration, interlineation or alteration in unprivileged will.

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

[*This is sec. 58 of the Succession Act X of 1865. It applies to Hindus, etc.*]

This section is based on sec. 21 of the English Wills Act, 1837.

Of Alterations, Interlineations and Obliterations in a Will.—If a will contains any alterations, interlineations or obliterations made after the will is executed the same shall not have any effect except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible. Under the English Wills Act the expression used is “except so far as the words or effect of the will before such alterations shall not be apparent which becomes apparent on inspection of the instrument, not apparent by extrinsic evidence.” A magnifying glass may be used to decipher the words obliterated. If, however, obliteration or erasure is such that the words could not be deciphered, there is entire destruction *protanto* of the will (*n*).

The alterations, interlineations or obliterations will only be given effect to in the following cases :—

(1) If the signature of the testator *and* of the attesting witnesses is made in the margin or on some part of the will opposite or near to such alterations ; or

(2) If a memorandum is signed by the testator and by the attesting witnesses at the end or some other part of the will referring to such alterations. The initials of the testator and of the witnesses are sufficient for this purpose ; but not the initials of the witnesses alone (*o*).

If these requisites are not complied with probate will be issued omitting the alterations (*p*). Generally speaking, if a will contains alterations or erasures, the

(*k*) *Subba Reddi v. Doraisami*, 30 Mad. 369.

(*l*) *Maharajah Pertab v. Maharanee Subhar Koor*, 3 Cal. 626 (P. C.); *Venkayamma v. Venkata*, 25 Mad. 678 (P. C.).

(*m*) *Mahomed v. Abdur Sattar*, A. I. R. (1938)

M. 616.

(*n*) *Townley v. Watson*, (1844) 3 Curt. 761.

(*o*) *In the goods of Blewitt*, (1880) 5 P. D. 116.

(*p*) *Raghubar v. Ram Rakhan*, 1 C. W. N. 428.

same will be deemed to have been made after the execution of the will and the burden will be upon the person who seeks to rely that the alteration was made before the will was executed (q); if there is no evidence rebutting this presumption the presumption is that they were made after the execution and they will not form part of the will (r), unless the requisitions mentioned in the section are complied with. Marginal notes made by the testator in his will which are not signed and attested will not form part of the will (s). The section treats of alterations, etc., made *after* the execution of the will and not before (t). As to alterations made before execution they will be admitted to probate upon proof of evidence that the same were made before. (Coote's Probate Practice, 15th Edn., p. 37).

Examples

(1) A by his will bequeaths Rs. 1,000 to B. A cancels Rs. 1,000, and writes over it Rs. 500. The cancellation is not signed by A or attested. The alteration is void and the original bequest remains, i.e., B takes Rs. 1,000(u).

(2) A by his will bequeaths to B as follows: "I bequeath Rs. 1,000 to B." He pastes over these words a piece of paper and writes over it, "I bequeath Rs. 500 to C." The pasting is not signed or attested. The bequest to C is void. The pasted paper will not be directed to be removed to discover what was written below it. B also, therefore, gets nothing and probate will be issued in blank as to that legacy. If, however, only the amount of legacy is covered up with name untouched, the Court may remove the upper paper to discover what was written below it on the principle of dependent relative revocation(v).

(3) A makes certain alterations in the body of his will. The alterations are not signed. A afterwards executes a codicil in which he confirms the alterations made in the will. The alterations will be given effect to(w).

(4) A makes a will in his own hand on four sheets and pins them together and dates it. A afterwards removes the second page and substitutes a new page which contains a bequest to a person not born at the date of the will. *Held*: probate refused of the substituted page(x).

(5) A executes a will and afterwards make alterations therein with pencil. A thereafter executes a codicil confirming the will as altered. *Held*: probate granted of the will as altered(y). Unattested alterations in a will are validated by a subsequent codicil confirming the will.

72. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

[This is sec. 59 of the Succession Act X of 1865. It is omitted in Schedule III so as to bring it in conformity with sections 65 and 66 of this Act which do not apply to Hindus. This section, therefore, does not apply to Hindus, etc.]

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| (q) <i>Cooper v. Bockett</i> , 4 Moo. P. C. 419. | (v) <i>In the goods of Horsford</i> , L. R. 3 P. & D. 211. |
| (r) <i>Pandurang v. Vinayak</i> , 16 Bom. 652. | (w) <i>Tyler v. Merchant Taylors' Co</i> , 15 P. D. 216. |
| (s) <i>Sardar Nouroji v. Putalibai</i> , 15 Bom. L. R. 352. | (x) <i>Ker v. Meakin</i> , 20 Bom. 370. |
| (t) <i>In the goods of L. P. D. Broughton</i> , 29 Cal. 311. | (y) <i>In the goods of L. P. D. Broughton</i> , 29 Cal. 311. |
| (u) <i>In the goods of Beavan</i> , 2 Curt. 369. | |

Revocation of Privileged Wills.—A privileged will or codicil can be revoked as follows :—

- (1) By an unprivileged will or codicil.
- (2) By any act expressing an intention to revoke accompanied by such formalities as would be sufficient to give validity to a privileged will.
- (3) By burning, tearing or destroying the will by the testator or by some person in his presence and by his direction with the intention to revoke it.
- (4) By the marriage of the testator (sec. 69).

73. (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.

Revival of unprivileged will.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

[This is sec. 60 of the Succession Act X of 1865. It applies to Hindus, etc.]

This Section is based on sec. 22 of the English Wills Act.

Of the Revival of Unprivileged Will and Codicil.—The only modes in which a revoked will or codicil can be revived are :

(1) By re-execution, *i.e.*, by its being signed again by the testator and attested by two witnesses. This is called *republication*. The re-execution must be with the requisite formalities. Where the testator cuts off his signature and those of the attesting witnesses, but gums the signatures again on the same place the will is not revived (a).

(2) By a codicil duly executed showing an intention to revive the will. This is called revival. The codicil *must show* an intention to revive the will by express words referring to the will. A will cannot be revived by mere implication. The will must be in existence. A will which has been destroyed cannot be revived (a). The testator's intention must be expressed and must appear on the face of the codicil. If the will is first partly revoked and then wholly revoked and then revived the revival will operate only on the portion last revoked, unless there appears that the whole will is intended to be revived. The distinction between republication and revival is that the revival restores a revoked will or codicil, while republication merely confirms an unrevoked testamentary instrument so as to make it operate as if executed on the date of republication, (Halsbury Vol. 34, p. 95).

When a will or codicil which has been partly revoked and afterwards wholly revoked is revived such revival does not extend to the part first revoked unless an intention to the contrary is shown.

A codicil reviving a revoked will will not necessarily revive every codicil thereto, *e.g.*, where a testator by 3rd codicil revoked first and second codicils and by the

(a) *Bell v. Fothergill*, (1870) L. R. 2. P. 148. (a) *Hale v. Tokelove*, (1850) 2 Rob. Eccl. 318.

4th codicil confirmed the will and the former codicils, it was held that only the will and the third codicil were revived, not the first and second (b). In *In re Baker, Baker v. Baker* (c), the testator executed a will and a codicil in 1893. In 1907 he made another will whereby he revoked the will and codicil of 1893. In 1911 he made a codicil to the will of 1907. In 1921 the testator made a third codicil which referred only to the will and codicil of 1893; it was held that the effect of the codicil of 1921 was to revoke the will of 1907 and the codicil of 1911 and to revive the will and codicil of 1893.

If a testator burns or destroys a will and afterwards executes a codicil which refers to the will with the intention of reviving it, the codicil cannot effect the revival, though there may be a draft of such a will.

Consequences of Revival or Republication.—The republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the republication or revival made a new will containing the same disposition as in the original will with the alterations introduced by the codicil reviving the will (d). In other words the will so republished is a new will as of the date of republication. Sec. 34 of the English Wills Act is to that effect. There is no corresponding section under this Act, but it was held in *Rani Chhatra Kumari Devi v. Mohan Birkam* (e) that the first will when revived by the third must be deemed to speak as from the date of its revival. Consequently it revokes any will of a date prior to that of the republication (f). Another consequence is that its operation is extended to subjects which have arisen between its date and republication, e.g., A, a bachelor by his will, gives a diamond ring to his wife Sarah. A afterwards marries Sarah and publishes the will again. Sarah will get the ring. A will which is revoked by the marriage of the maker will be revived by a codicil made after the marriage, though it does not expressly confirm or revive the will but refers merely to "the last will of me" and "my said will," no other will of the testator being in existence (g). Another consequence is that if it contains a clause revoking former wills all intermediate wills will be revoked, (Mortimer on Probate, p. 248).

Evidence of Intention to revive:—The expression "unless an intention to the contrary shall be shown by the will or codicil" seems to imply that parol evidence will not be admissible to prove such intention to revoke. It is a deviation from the English law because the expression used in sec. 22 of the English Wills Act is "Unless the intention to the contrary shall be shown." The words "by the will or codicil" used in this section were added with the object of excluding parol evidence.

CHAPTER VI

Of the Construction of Wills.

74. It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

[This is sec. 61 of the Succession Act X of 1865. It applies to Hindus, etc.]

(b) *Goods of Carrith*, 66 L. J. 379.

(c) (1929) 1 Ch. 668.

(d) *Goonewardene v. Goonewardene*, 61 M. L. J. 340; A. I. R. (1931) P. C. 307.

(e) 10 Pat. 851; 33 Bom. L. R. 1390 (P. C.).

(f) *Rogers v. Pittis*, 1 Add. 38.

(g) *Neate v. Pickard*, 2 Notes of Cas. 406.

Technical Words :—This Chapter comprises sections 74 to 111 containing the rules for the construction of wills and the lapse of legacies. Here again the English law of personality has been followed. The rule giving the legacy absolutely to the first taker where words of limitation and not of purchase are added render it impossible in India to create an estate tail by will. The provisions of this Chapter are mostly taken from the decided cases of English Courts of Chancery. But in interpreting the section the law should be ascertained by interpreting the language used in that section instead of searching the authorities to discover what the law was laid down by such authorities (*h*).

A testamentary document requires no special form of words. A will may be made in any form and in any language. This section lays down that no technical words or terms of art are required to be used in making a will.

But if technical words are used by the testator he will be presumed to use them in their legal sense unless the context indicates a clear contrary intention (*i*).

There are two cardinal principles to be observed in the construction of wills, viz., the rule of law and the rule of construction. (See Halsbury Laws of England, Vol. 84, p. 160). A rule of construction is one which points out what a Court shall do in the absence of express or *implied intention*. A rule of law is one which takes effect when certain conditions are found, although the testator may have intended an intention to the contrary (*j*). The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words or words of known legal import must have their legal effect (*k*). Where a rule of law has affixed a certain determinate meaning to technical expressions that meaning is to be given to them. Where technical terms of English law are used in Hindu wills in their technical sense, then the intention will fail (*l*). But if the testator had no intention of introducing English law and the terms are used inadvertently or by analogy and with an imperfect knowledge of their real technical sense the terms will be construed in their plain and natural sense (*m*), unless such words are of such a nature as to make it clear that the testator did not mean to use technical terms in their technical sense (*n*). A clear context or stronger evidence from the surrounding circumstances is needed to convince the Court. The expression "in trust" will not invariably create a trust (*o*). When the language of the will is clear and consistent it must receive its literal construction, unless there is in the will itself something to suggest a departure from it (*p*), e.g., where a testator by his will authorises his widow "to draw such sums of money as she may require for her maintenance," the widow is not entitled to draw any amount she likes but only such amount as should be necessary for the purpose (*q*).

Intention of Testator :—The primary duty of the Court is to endeavour to ascertain the intention of the testator from the will itself and from the language used by him (*r*), and on doing so the Court is entitled and bound to bear in mind other matters than merely the words used in the will (*s*).

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| (<i>h</i>) <i>Narendra Nath v. Kamalbasini</i> , 23 Cal. 263 (P. C.). | (o. c. j.) ; <i>Towns v. Wentworth</i> , 11 Moo. P. C. 526. |
| (<i>i</i>) <i>Thelluson v. Woodfall</i> , 4 Ves. 329. | (<i>o</i>) <i>Mary v. George</i> , 31 Mad. 283. |
| (<i>j</i>) <i>In re Coward</i> , 57 L. T. 285. | (<i>p</i>) <i>Gurusami v. Sivakami</i> , 18 Mad. 347 ; 22 I. A. 119. |
| (<i>k</i>) <i>Lalit Mohan v. Chukhun</i> , 24 Cal. 384 (P. C.) ; <i>Gurudas v. Bhupendra Nath</i> , 43 C. W. N. 141. | (<i>q</i>) <i>Mary v. George</i> , 31 Mad. 283. |
| (<i>l</i>) <i>Kristoromoni Dasi v. Narendro Krishna</i> , 16 Cal. 383 P. C. ; 16 I. A. 29. | (<i>r</i>) <i>Narasimha v. Parthasarathy</i> , 37 Mad. 199 (P. C.). |
| (<i>m</i>) <i>Harris v. Brown</i> , 28 Cal. 621. | (<i>s</i>) <i>Lalta Baksh v. Phool Chand</i> , A. I. R. (1915) P. C. 113. |
| (<i>n</i>) <i>Lakshmi Bai v. Ganpat</i> , 4 B. II. C. R. 150 | |

The first cardinal rule in making the will is that the wording must be such that the intention of the testator can be known therefrom. The application of this rule resolves itself into two canons of construction (1) to find out what is the intention of the testator as disclosed by the will (*l*) and (2) how can effect be given to that intention.

In a case where the Court is being asked to construe a will, there are certain rules of construction which it must observe but when it is a question of determining the meaning of certain words read in conjunction with other words and of reading the whole will so as to ascertain the true intention of the testator from the language used, then it is a fallacy to say that the Court is necessarily bound to approach the question of the intention blindfold because of the decision, even a decision of the House of Lords in some other cases of construction where the same words were used in different connection and that such decision is necessarily binding in every other case where the words appear although the connecting language as a whole may not be the same (*u*). The first duty of a Court of construction is, therefore, to ascertain not what the testator meant but what is the meaning of the words used by him. "It is very often said that the intention of the testator is to be the guide; but the expression is capable of being misunderstood and may lead to a speculation. The only and proper inquiry is what is the meaning of that which he has actually written" (*v*). The Court has no power to give effect to a hypothetical intention by supplying lacunæ in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intentions of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will (*w*). The Court cannot make a will for the testator. It must construe the will he has made. It is not for any Court to try to discover whether a will could not have been made more consonant with reason or with justice. Where a will has been made and is apparently in perfect form and the evidence of the attesting witnesses is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought in the opinion of the Court to have made (*x*). The Court cannot make a will for the testator, the only thing it can do is that it will construe the will he has made (*y*). In construing a will if the Court finds that the whole plan of the testator cannot be carried out it will nevertheless uphold that part which gives effect to the paramount intention of the testator (*z*). When the language is clear and unambiguous the will must be construed in accordance therewith (*a*). To ascertain the intention of the testator, the Court is concerned with three distinct questions:—(1) What words has the testator used to express his intention, (2) what is the meaning of such words in relation to the persons and things described and (3) what is the meaning of the words in relation to the dispositions of such property among the donees. When the intention of the testator has been discovered then the next inquiry by the Court should be to ascertain whether there is any rule preventing the intention from taking effect and how the intention can be effectuated, (Halsbury's Laws of England, Vol. 28, pp. 626-628). Where the language of the will is clear and consistent it will receive its literal construction, unless there is something in the will itself to suggest a departure from it (*b*).

The construction or interpretation of wills and especially wills written in vernacular languages of India has given occasion to innumerable cases and this

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| (<i>l</i>) <i>Ernest William v. Mrs. H. S. F. Gray</i> , 48 M. L. J. 707. | C. 68. |
| (<i>u</i>) <i>In re Diplock</i> , (1940) 1 Ch. 988 at 992. | (<i>x</i>) <i>Suna Ana v. S. R. Ramaswami</i> , 20 C. W. N. 673 (P. C.). |
| (<i>v</i>) <i>Roddy v. Fitzgerald</i> , 6 H. L. Cas. 823; <i>Rameshwar v. Balraj</i> , 37 Bom. L. R. 862 (P. C.); <i>Purnananthachi v. Gopalaswami</i> , 41 C. W. N. 14 (P. C.). | (<i>y</i>) <i>Robertson v. Broadbent</i> , L. R. 8 H. L. 62. |
| (<i>w</i>) <i>Loke Nath v. Abani Nath</i> , A. I. R. (1941) | (<i>z</i>) <i>Raghunath v. Deputy Collector of Partabgarah</i> , 32 Bom. L. R. 129 (P. C.). |
| | (<i>a</i>) <i>Mst. Jio v. Mst. Rukman</i> , 8 Lah. 219. |
| | (<i>b</i>) <i>Gurusami v. Sivakami</i> , 18 Mad. 347 P. C. |

branch of the law has become a baffling subject to lawyers and to students. It is, however, encouraging to note that the practice of construing one will by the interpretation put on another by a judicial tribunal has been condemned by their Lordships of the Privy Council and especially the practice of applying the rules of interpretation of English wills to wills executed by the natives of India. Lord Macnaghten in *Bhagabati v. Kali Charan (c)*, condemns this practice in the following passage of his judgment, "It is no new doctrine that the rules established in English Courts for construing English documents are not as such to be applied to transactions between natives of India. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point, think differently and speak differently from Englishmen and who have never heard of the rules in question." Again in *Norendra Nath v. Kamalbasini (d)* "To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which encumber our English law reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life seems almost absurd." In *Dinbai v. Nusserwanji (e)*, Lord Parmoor whilst interpreting the will of a Parsi reiterated the same expression. These warnings have been observed now by the Indian Courts. In *Gulbaji & Co. v. Rustomji (f)*, Marten, J., observes "In several cases there have been warnings from the Privy Council not to apply decisions on English wills—many of which rest on technical considerations peculiar to the law of England—to the wills of Indians, but at the same time one does get decisions from time to time which, although they are on Indian wills, would seem to depend on the application of some English rule of construction," e.g., as regards the contingent and executory bequests the Act has laid down certain hard and fast rules which must be applied without speculating on the intention of the testator (g). The ignorance of the testator to use appropriate words for giving a vested or contingent bequest may lead to defeat at times the intention of the testator but the Court of construction cannot help it (h). In *Raghunath v. Deputy Commissioner of Partabgarh (i)*, their Lordships again gave another warning, "It is always dangerous to construe words of one will by the construction of more or less similar words in a different will." Again Lord Macmillan in *Kamakhyia v. Khushal Chand (j)*, repeats the same warning, "In construing the language and arriving at the intention of the testator decision on the construction of other wills are of little assistance. In each case the Court must ascertain the dominant intention of the testator reading the will as a whole." Reference may also be made to the observation of Lord Wensleydale in *Roddy v. Fitzgerald (k)*, quoted by Sir John Edge in *Venkatadri v. Parthasarathi (l)*, "The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is what is the meaning of that which

(c) 38 Cal. 468; 38 I. A. 54.

(d) 23 Cal. 563; 23 I. A. 18.

(e) 49 Cal. 1005 (P. C.)

(f) 49 Bom. 478.

(g) *Norendra Nath v. Kamalbasini*, 23 Cal. 563 (P. C.).(h) *Ratanbai v. Cawasjee*, 24 Bom. L. R. 1124 at 1134 reversed 27 Bom. L. R. 1 (P. C.).

(i) 32 Bom. L. R. 129 (P. C.).

(j) 36 Bom. L. R. 399.

(k) (1858) 6 H. L. C. 823.

(l) 27 Bom. L. R. 823 at 835.

he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator." Having regard to these expressions of opinion from these commentaries innumerable cases of construction of English wills have been omitted and this difficult branch is attempted to be simplified as much as possible. The Privy Council will also not disturb an interpretation of a vernacular will unless some very wrong principle of interpretation has been applied(m).

Construction of Hindu Wills.

"In construing the wills of a Hindu it is not improper to take into consideration what are known to be the ordinary motives and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that his estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate," per Sir Andrew Scoble in *Radha Prosad v. Ranimoni* (n). Sir Binode Mitter in *Bolo v. Koklan* (o) observes, "In construing the will of a Hindu, while it is legitimate to take into consideration what are known to be the ordinary motives and wishes of a Hindu with respect to the devolution of his property, the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning".

The following Vernacular Words have acquired a technical Meaning.

(1) "Malik," "Kul Malik," "Malik-Wa-Quabiz," "Malik-Musta-quil."—The word "*Malik*" was differently construed until the Privy Council decision in *Lalit Mohun v. Chukkun Lal* (p), where their Lordships held that unless there was anything in the context of the will restricting its meaning the word "*Malik*" will convey an absolute, heritable, and alienable interest, even if the donee of the estate is a woman (q). In *Bhaidas Shivdas v. Bai Gulab* (r), the word "*Malik*" was held to convey an absolute estate. In the following cases *malik* was held to convey absolute interest, including the right of alienation (s). In order to cut down the full right that the word *malik* imports, something must be found in the context to qualify it and the fact that the donee was a woman and a widow did not suffice. (t).

If in a particular case the context and the circumstances show that an absolute estate was not intended the Courts will construe the word in a limited sense. But the contrary intention must be expressed in clear unambiguous terms.

In the following cases the word "*Malik*" was held to convey a limited interest (u).

(m) *Kamakhyia v. Kushalchand*, 61 I. A. 145.

(n) 35 I. A. 118=35 Cal. 896.

(o) 32 Bom. L. R. 1596.

(p) 24 I. A. 76,

(q) *Bipradas v. Sadhan Chandra*, 56 Cal. 790.

(r) 49 I. A. 1.

(s) *Chuntal v. Bai Muti*, 24 Bom. 420; *Padamlal v. Tek Singh*, 29 All. 217; *Lala Ramjewan v. Dal Koer*, 24 Cal. 406; *Amarendra v. Shuradhani*, 14 C. W. N. 453; *Sasiman v. Shib Narayan*, 24 Bom. L. R. 576; *Kamla Prasad v. Murl Manohar*, 13 Pat. 551; *Golak Behari v. Sura Dhani Dasi*, (1939) 1 Cal. 63=A. I. R. (1939) C.

226=68 C. L. J. 246 (In this case the law on this subject is fully discussed).

(t) *Surajmani v. Rabi Nath*, 30 All. 84; 35 I. A. 17.

(u) *Motilal v. Ado-General*, 35 Bom. 279; *Shirinbai v. Ratanbai*, 43 Bom. 845; (in appeal 45 Bom. 711 P. C.); *Mithibai v. Meherbai*, 46 Bom. 162; *Punchoo Money v. Troyucko*, 10 Cal. 342; *Ashrafi v. Bidya Prashad*, 26 Bom. L. R. 776 (P. C.); *Basantakumar v. Ramshankar*, 59 Cal. 859; *Ram Rakhi v. Peoples Bank*, A. I. R. (1942) L. 42.

“**Kul Malik**” or “**Kul Swatrantra Malik**.”—The words are construed as conferring an absolute interest (*v*).

“**Malik-Wa-Quabiz**.”—This word is construed as conferring an absolute interest (*w*).

“**Malik-Mustaquil**.”—This word is construed as conferring an absolute interest(*x*).

The following are further cases where the word “**Malik**” coupled with some other expression is construed as conferring an absolute interest. “**Malikatwa**” absolute(*y*). “**Malik-Wa-Khud-ikhtiyar**” absolute(*z*). “**Nirbandha Malik**” absolute(*a*). “**Malik Dakhadikar**” limited(*b*).

(2) **Poutra Poutradi**.—Ordinarily these words are words of inheritance and will convey absolute interest(*c*). These words do not limit the succession to sons grandsons and male descendants alone. In *Saronda Prasad v. Debendra Nath*, (*d*) a bequest was to A poutra poutradi krame and it was held that A took the bequest absolutely but as A predeceased the testator the legacy lapsed under sec. 105. In *Ramlal v. Secretary of State*(*e*), it was held that they were words of inheritance and would apply to male as well as female heirs(*f*). “**Poutra Poutradi Santate**” were held to confer on absolute estate(*g*); “**Poutra Poutradi Krame**” absolute(*h*). In the following few cases these words were held not to convey absolute interest(*i*). “**Auras Poutra Poutradi**” were held to be words of limitation and not of inheritance(*j*). The words “**putra poutradi paiyantum**” even when applied to a female were construed as conferring an absolute estate(*k*).

(3) **Waras or Waris**.—This word would ordinarily convey an absolute interest(*l*). The word “**Waris**” or “**Warison**” denotes absolute interest unless there is anything contrary in the will. In *Jotiram v. Bai Diwali*(*m*) a bequest by a Hindu to his wife as “**Malik**” or “**Waras**” was construed to confer absolute interest. The Bengali word “**Warrish**” is equivalent to the English word “**heir**”(*n*). But in *Chunilal v. Bai Muli*(*o*), the words ‘**Malak or Waras**’ were construed to give limited interest. The word “**Aulad**” does not necessarily mean “**children**,” it means descendants or progeny(*p*). For “**Bapika Vausmathi**,” see *Dayabhai v. Chunilal*(*q*). The word “**Bangsa**” in a Hindu will means family and not merely lineal descendants(*r*).

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| (v) <i>Lalbhai v. Mansukh</i> , 8 Bom. L. R. 48 ;
<i>Keoti v. Dalsukhran</i> , 46 Bom. L. R. 908. | (g) <i>Chandmal v. Vishvanath</i> , 24 Bom. L. R. 300. |
| (w) <i>Fateh Chand v. Rupchand</i> , 48 I. A. 183 ;
<i>Mussammatt Ram Kaur v. Atma Singh</i> , 8 Lah. 181 ; <i>Surajmani v. Rabi Nath</i> , 35 I. A. 17. | (h) <i>Kartik Mandal v. Bama Charan</i> , 20 C. W. N. 182 ; <i>Bipradas v. Sadhan</i> , 56 Cal. 790. |
| (x) <i>Bishunath v. Chandika</i> , 35 Bom. L. R. 891 (P. C.), 60 I. A. 56, 55 All. 61. | (i) <i>Lal Gajendra v. Lal Mathura</i> , 20 C. W. N. 876 (P. C.) ; <i>Ram Narayan, v. Ram Saran</i> , 46 Cal. 683 (P. C.). |
| (y) <i>Rajnarain v. Ashutosh</i> , 27 Cal. 44,
<i>Rajnarain v. Katyayani</i> , 27 Cal. 649. | (j) <i>Ekradeshwar v. Janeshwari</i> , 42 Cal. 582 (P. C.). |
| (z) <i>Surajmani v. Rabi Nath</i> , 35 I. A. 17. | (k) <i>Bhujanga v. Ramayamma</i> , 7 Mad. 387. |
| (a) <i>Sures Chandra v. Lalit Mohun</i> , 20 C. W. N. 464. | (l) <i>Shalig Ram v. Charanjit</i> , 57 I. A. 282, 32 Bom. L. R. 1578, followed in <i>Jagmohan v. Sri Nath</i> , 57 I. A. 291. |
| (b) <i>Basantakumar v. Ramshankar</i> , 59 Cal. 859. | (m) 41 Bom. L. R. 289. |
| (c) <i>Hori Dasi v. Secretary of State</i> , 5 Cal. 228 ;
<i>Gooroodas v. Sarat Chunder</i> , 29 Cal. 699 ;
<i>Ram Saran v. Ram Narayan</i> , 42 Cal. 805, 46 Cal. 683 (P. C.). | (n) <i>Gurudas v. Bhupendra Nath</i> , A. I. R. (1939) C. 206. |
| (d) 21 P. L. T. 37. | (o) 24 Bom. 420. |
| (e) 7 Cal. 804 (P. C.) ; 8 I. A. 47. | (p) <i>Kannya Lal v. Mussammatt Hira Bibi</i> , 15 Pat. 151. |
| (f) See also, <i>Lalit Mohun v. Chukkun Lal</i> , 24 Cal. 834 (P. C.) | (q) 10 Bom. L. R. 97. |
| | (r) <i>Prasaddas v. Jagannath</i> , 60 Cal. 538. |

75. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Inquirer to determine questions as to object or subject of will.

Illustrations

(i) A, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grand-child, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(ii) A, by his will, leaves to B "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(iii) A, by his will, leaves to B "the estate which I purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

[This is sec. 62 of the Succession Act X of 1865. It applies to Hindus with this addition that the words "son," "sons," "child," and "children" shall include an adopted child and the word grand-children shall include the children whether adopted or natural-born of a child whether adopted or natural-born, and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son; see Schedule III., cl. 5.]

This section is almost copied from the passage in Williams on Executors, 10th Edn., p. 904 and deals with the admissibility of extrinsic evidence in aid of interpretation of wills.

Although a will always speaks from the date of the death of the testator, in construing the will, the Court of construction should determine the facts and circumstances respecting the testator's property and his family and other persons and things as at the date of the will in order to give effect to the words used in the will when the meaning and applications of his words cannot be ascertained without taking evidence of such facts and circumstances. For this purpose evidence is receivable to enable the Court to ascertain all the persons and facts known to the testator when he made the will. The Court, it has been said, puts itself into the testator's armchair. This arm chair rule, however, does not apply where the subject-matter of the bequest was not in existence at the date of the will.

Among such facts and circumstances which the Court is bound to consider none would be more important than race and religious opinions and the Court is bound to regard as presumably present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will and to ascertain the meaning of its language. So soon as the construction is settled the duty of the Court is to carry out the intentions as expressed and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must in case that eventuality arises be dealt with according to the law. In all cases it must legally carry out the will as properly construed and this duty is universal and is true alike of wills of every nationality and every religion or rank of life(s). The expression "subject of disposition" used in the section may mean the property itself or the quantity of interest such property is intended to embrace. In order to show what thing the testator intended to dispose of by the description all the circumstances relating to the

property of the testator material to identify the thing described are admissible, (see *ill. ii*) *e.g.* whether the property was or was not in existence at the date of the will as belonging to the testator or in his possession and the local situation, (see *ill. iii*).

With regard to the admissibility of evidence in respect of property acquired after the date of the will and added to the property at the date of the will, the decisions are conflicting(*t*). See Halsbury Vol. 34, p. 235.

The Court may, in such circumstances, inquire into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs to identify the person intended by the testator(*u*).

Examples

(1) A testator makes a bequest to "my nephews and nieces." The testator had no nephews and nieces at the date of the will or at his death, but there were nephews and nieces of his wife. Evidence will be admissible to show that the words referred to the nephews and nieces of the testator's wife(*v*).

(2) A testator by his will made in 1891 devised his property to his wife for life and after her death "unto and to the use of John William Halston (otherwise Alston) the son of Israel Halston (otherwise Alston)" in fee simple. The testator died in 1899 and his widow, the tenant for life, in 1911. Israel Alston had a son called John William Alston who was born in 1874 and whose existence was known to the testator but who died 10 days after his birth, *i.e.*, 17 years before the date of the will. This son's death was well-known to the testator. Israel Alston had another son named John Robert Alston who claimed the property. There was evidence that the son who died had received his name at the request of the testator and also that the testator desired that J. R. Halston should bear the name of John. Further, that the testator had told J. R. Halston that the land would be his some day. *Held*, that the testator must have contemplated some person who was alive at the date of his will to be the object of his bounty and on the extrinsic evidence which was admissible the testator intended to devise the property to John Robert Halston(*w*).

(3) A testator gave legacies "to Mary, Elizabeth, and Ann, the daughters of Mary Benyon." At the date of the will Mary Benyon had two legitimate daughters Mary and Ann, and an illegitimate daughter Elizabeth. Elizabeth claimed the legacy as one of the persons fully answering the description. Extrinsic evidence was admitted to show that Mary Benyon formerly had a legitimate daughter named Elizabeth who died some years before the execution of the will, and that the testator did not know either of her death or of the birth of the illegitimate daughter. *Held*, Elizabeth was not entitled to the legacy. A testator cannot be taken to have meant to benefit a person of whose existence he was not aware, even if that person fully answers to the description(*x*).

Evidence.—This section deals with the inadmissibility of extrinsic evidence in aid of interpretation of wills. Under this section the only evidence admissible is to show what the testator has written and not evidence to show what he intended to have written, *i.e.*, the facts and circumstances corresponding as far as possible with those referred to in the will. If the legatee is correctly described in the will, no further inquiry is necessary and no extrinsic evidence will be admissible. But if the person claiming as legatee is not that mentioned in the will or if the person described in the will has died or the property described has ceased to conform to the description, further evidence may be admitted to discover some other subject existing at the date of the will to which the words may refer as understood by the testator(*y*). For this purpose that the Court may inquire into the *material* fact relating to the person who claims to be the legatee and to the circumstances of the testator and of his family and affairs to ascertain the identity of such person.

- (*t*) *Webb v. Byng*, 1 K. & J. 580; *Castle v. Fox*, 11 Eq. 42; *Re Potter*, 88 L. J. 405.
- (*u*) *Drake v. Drake*, 8 H. L. 172.
- (*v*) *Sherratt v. Mountford*, L. R. 8 Ch. 928.
- (*w*) *In re Halston, Ewen v. Halston*, (1912) 1 Ch. 485.

- (*x*) *Doe d. Thomas v. Benyon*, 12 Ad. and E. 431, (see also *ill. iii*, to sec. 76).
- (*y*) *Re Ha'ston, Ewen v. Halston*, (1912) 1 Ch. 435; *Re Jameson, King v. Winn*, (1908) 2 Ch. 111.

Evidence is admitted of the habits of the testator, *e.g.*, his habit to call a particular person by a nickname and the state of his family(*z*). With regard to the description of property which is not accurately satisfied as ordinarily understood evidence is admitted of the testator's habit of dealing with certain property under that description and of its accuracy as he understood it and all the circumstances material to identify the thing described, (Halsbury's Laws of England, Vol. 34, pp. 171-172).

But when the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred the Court is precluded from going outside the actual words used by the testator (*a*). The evidence under this section is let in when the words are neither ambiguous nor obscure (*b*). Where the words are ambiguous sec. 81 will apply.

76. (1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(i) A bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.

(ii) A bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas will have the legacy.

(iii) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.

(iv) The testator gives his residuary estate to be divided among "my seven children." and, proceeding to enumerate them, mentions six names only. This omission will not prevent the seventh child from taking a share with the others.

(v) The testator, having six grandchildren, makes a bequest to "my six grand children." and proceeding to mention them by their Christian names, mentions one twice over omitting another altogether. The one whose name is not mentioned will take a share with the others.

(vi) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the will A has four children. Each of these four children will, if he survives the testator, receive a legacy of 1,000 rupees.

[This is sec. 63 of the Succession Act X of 1865. It applies to Hindus with this addition that the words "son", "sons", "child" and "children", shall include an adopted child, and the word "grand-children" shall include children whether adopted or natural born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son; see Schedule III., cl. 5.]

Misdescription of the Object of the Bequest.—This section deals with the misnomer or misdescription of the *object* of the bequest, *viz.*, a misnomer or misdescription of the legatee or legatees. Sections 78 and 79 deal with the misdescription

(*z*) *Janardhan v. Narayan*, 39 Bom. L. R. 1151. (*b*) *Charter v. Charter*, L. R. 7, H. L. 364; see also sec. 80.

(*a*) *Pentonji v. Framji*, 12 Bom. L. R. 863.

of the subject of the bequest, viz., the legacy. A false description does not affect a gift if it is clear what is the object described. *Falsa demonstratis non nocet*. If the legatee is designated by name and description, and if there is a person who has the name but the description is incorrect, the description will be neglected (see *ill. ii*) (c). Similarly where a description is correct and the name incorrect, the incorrect name will be neglected (see *ill. i*). But the mere fact that a person fully answers the description given in the will will not entitle him to take under it if it appears that the testator was not aware of his existence (d). Where either the name alone or the description alone is sufficient to identify an object and they do not identify the same object then, according to the circumstances of the case, the description and not the name, or the name and not the description may prevail. The name is only a description. The test adopted in such a case is to inquire whether the testator was in the circumstances more liable to err when he described the legatee by name or when he attempted to point him out by description; the Court adopts that description which in each instance appears to be least open to error (Halsbury's Laws of England, Vol. 34, p. 233).

Description of Donees by Number.—Apart from the mistake in name or description the illustrations (iv), (v), (vi), deal with mistakes in enumeration in a gift to a class. When the bequest is to a class describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the enumeration on the presumption of mistake and all the members of the class in existence *at the date of the will* are held entitled, unless it can be inferred who are the particular members intended in which case the Court holds those children entitled to the exclusion of others. Where the number of children mentioned in the will exceeds the actual number, all the children are entitled (e). If a testator gives "to the *three* children of A the sum of £ 600 a-piece" and A had four children all born before the date of the will, the four children are entitled to receive £ 600 each (f). (See *ill. vi*). But where the number mentioned by the testator agrees with the number existing at the date of the will, the gift will not be extended to an after born child, although *en ventre sa mere* at the date of the will (g).

The ground on which the Court proceeds in such cases is that there had been a mere slip in the expression used by the testator. The rule may also be stated thus: that in case of a testamentary gift to a class, describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the members of the class in existence at the date of the will are held entitled, unless it can be inferred who are the particular members intended in which case the Court holds those children entitled to the exclusion of the others (h).

The number of children are calculated at the date of the will and not at the date of the death of the testator. (Halsbury Vol. 34, p. 301).

Examples

(1) A has three sons and one daughter. A bequest is made to the four sons of A. The daughter takes the bequest with the sons (i).

(2) A bequeaths Rs. 1,000 to each of the three children of A. At the date of the will, A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees (j). (*ill. vi*.)

- (c) *Lalla Prasad v. Salig Ram*, 31 All. 5 ;
- Murari Lal v. Kundan Lal*, 31 All. 339.
- (d) *Doe d. Thomas v. Benyon*, 12 Ad. & E. 431.
- (e) *In re Alcock*, (1945) W. N. 97.

- (f) *Daniell v. Daniell*, 3 De G. & S. 337.
- (g) *Re Emery's Estate*, 3 Ch. D. 300.
- (h) *Newman v. Pricey*, (1877) 4 C. D. 41.
- (i) *Lane v. Green*, 4 De G. & Sm. 239.
- (j) *In re Alcock*, (1945) 1 Ch. 264.

(3) A testator bequeaths "to the two sons and the daughter of A £50 a-piece." At the date of the will and at the death of the testator A had one son and four daughters. Each of these five children shall receive £50(k).

Evidence.—For the purpose of ascertaining the persons to take under certain names and descriptions evidence is admissible of the objects the testator was likely to benefit, *viz.* that the testator was in the habit of using particular names or nick names towards such objects. For this purpose any documents or writings of the testator including a prior will are admissible. If some one fully answers the description given in the will, evidence to show that another was meant is not admissible(l).

The testator may have habitually called certain persons by peculiar names and of this evidence is admissible; but where a blank is left for the name of a legatee or merely single letters are used for the name of a legatee no evidence of intention is admissible and the gift is void for uncertainty.

Gift to Persons filling a certain Character

The distinction between what is a description only and what is the reason or motive for a gift or bequest may often be fine; but it must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to "his wife A" believing the person to be his lawful wife and he has not been imposed upon by her and falsely led to believe that he could lawfully marry her and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. In such a case whether the marriage was lawful or not may be considered to make no difference in the intention of the testator(m).

Where a gift is made to a named legatee in a certain character, and there is no doubt as to the person intended the misdescription shall not frustrate the bequest. But if the legatee fraudulently assumed a character for the purpose of deceiving the testator and procuring a legacy and the character is presumed to be the motive of the testator's bounty, the legatee will be deprived of the legacy(n). In *Wilkinson vs. Joughin*(o) a testator bequeathed his estate upon trust to his wife Adelaide for life and then to his step-daughter Sarah (daughter of Adelaide). Adelaide had represented that she was a widow but in fact her husband was alive. It was held that the bequest to her was void but that to the step-daughter was valid. But in *Administrator General vs. White*(p) the bequest to the wife was held to be valid as there was no suggestion of fraud and the marriage was not strictly proved. In such cases the question must be raised in the Court of Probate(q).

Wife.—Where the legatee is described as the wife of a person and that person is married at the date of the will, then, in the absence of a context to the contrary, the wife existing at the date of the will is *prima facie* intended to take and not any subsequent wife(r). But the description of wife may include a subsequent wife, a person not married to the testator or other person whose wife she is said to be or an affianced wife, (Halsbury's Laws of England, Vol. 34, p. 326).

Where there is a bequest to "my wife" the testator must be taken to consider that there was some person who could take under that designation. He cannot be supposed to refer to a future wife as subsequent marriage would revoke the will. Hence a reputed wife or a deceased wife's sister (before the passing of the Act in

(k) *Harrison v. Harrison*, 1 Russ. & M. 71.

Kennell v. Abbott, 4 Ves. 302.

(l) *Pestonji v. Framji*, 12 Bom. L. R. 868; *In the goods of Peel*, 2 P. & D. 46.

(o) L. R. 2 Eq. 319.

(p) 13 Mad. 379.

(m) *Fanindra v. Rajeswar*, 11 Cal. 463; 12 I. A. 72.

(q) *Meluish v. Milton*, (1876) 3 Ch. D. 27.

(r) *Garra v. Niblock*, (1830) 1 Russ. & M. 629.

(n) *Allen v. Mc. Pherson*, 1 H. L. Cas. 191;

England) he may have married, will take(s). or though the marriage may afterwards be declared void *ab initio*(t).

Example

A became engaged and was betrothed to B. By his codicil after mentioning B's name and alluding to his intended marriage with her he gave £ 3,000 "to my wife." A died before marriage. Held, B was entitled to the legacy(u).

If a legacy is given "to my wife A" the gift is not void if A does not happen to fill that character(v). But if an annuity is given to a woman with whom the testator lived on intimate terms "during her widowhood" and if the testator had not in fact married the woman, the woman cannot be his widow and the gift failed(w).

Example

A legacy is given by A "to my wife B." The wife procures a divorce after the execution of the will. The bequest to B nevertheless takes effect (x). As the name is correct, the description may be rejected.

Husband.—Similar rules apply to the description "husband".

Children.—The word "child" is synonymous with infant child but in wills it is construed as sons and daughters whatever their age. A bequest to persons described as "children", "issue" and the like refers only to legitimate and not illegitimate relatives(y); see sec. 100. When the gift is to the "children" of a man or children of a man by a certain woman and is such that in the circumstances existing illegitimate children are denoted, the gift is construed as referring to those who at the date of the will have acquired the reputation of being the named man's children. (See *ill. iii*). For the description of children "begotten" and "to be begotten" see Halsbury, Vol. 34, p. 303.

Son.—A legacy to "a son" of a person will go to the son living at the date of the will, and if there is no son living it goes to the first son born afterwards, if he survives the testator(z).

If a legacy is bequeathed to the first or second son of a particular person they will take in order of birth. If all the sons born are living at the testator's death, the first born son will take under the term "first son" and second born son as the "second son". If the first or second son is dead at the date of the will, the term will mean first or second son at the testator's death(a). If a first or second son is born at or after the date of the will but dies in the testator's lifetime, a first or second surviving son will take(b). (Theobald on Wills, 7th Edn., p. 278). "Eldest son" standing alone means the first born son(c). (See Halsbury, Vol. 34, p. 308).

Daughter.—The words "unmarried daughter" mean a daughter who has never been married(d), but it may also mean a daughter "not having a spouse at the time contemplated in the will(e)." (Halsbury Vol. 34, p. 197, Note c.)

Servants.—A gift to servants is not necessarily confined to servants living in the house. The term domestic servants will be confined to servants living in the

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| (s) <i>In re Petts</i> , 27 Beav. 576; <i>Pratt v. Mathew</i> , 22 Beav. 328. | (a) <i>King v. Bennett</i> , 4 M. & W. 26; <i>Powell v. Davis</i> , 1 Beav. 532; <i>Ashburner v. Wilson</i> , 17 Sim. 214. |
| (t) <i>Re Boddington, Boddington v. Clairat</i> , 25 Ch. D. 685. | (b) <i>Lomax v. Holmden</i> , 1 Ves. Sen. 290. |
| (u) <i>Schloss v. Stiebel</i> , 6 Sim. 1. | (c) <i>Bennet v. Bennett</i> , 2 Dr. & Sim. 266 at p. 275; (see also <i>Richard Skinn v. Durga Prasad</i> , 31 A. L. 239; <i>Skinner v. Naunihal Singh</i> , 35 All. 211 (P. C.). |
| (v) <i>Harris v. Brown</i> , 28 Cal. 621. | (d) <i>Clarke v. Colls</i> , 9 H. L. Cas. 601, |
| (w) <i>In re Gale, Gale v. Gale</i> , (1941) 1 Ch. 209. | (e) <i>Heywood v. Heywood</i> , 29 Beav. 9. |
| (x) <i>Re Boddington</i> , 25 Ch. D. 685. | |
| (y) <i>Cartwright v. Vardry</i> , (1800) 5 Ves. 530. | |
| (z) <i>Powell v. Davies</i> , 1 Beav. 532. | |

house and would exclude out-door servants. A bequest to servants would be confined to those servants who were in the testator's service at his death(*f*), so in some cases it may mean servants in the employ of the testator at the date of the will(*g*). A gift to the "past and present members of the staff of the Midland Bank" is not void for uncertainty(*h*). The servants who had been discharged before the testator's death or who had voluntarily left his service or dismissed are not entitled to anything. But a servant who at the testator's death has temporarily left his house and is to return to service is entitled to the legacy(*i*) (see Halsbury, Vol. 34, p. 328).

Adopted Son.—Where a bequest is made to a person who is described as an adopted son but he is not adopted or whose adoption is subsequently declared to be invalid, the validity of the bequest will depend on the intention of the testator(*j*). If the intention is to benefit the individual irrespective of the adoption, he will take it as *persona designata*(*k*). But if the adoption is the motive of the testator's bounty then the bequest will not take effect(*l*). The principle to be deduced from these cases is as pointed out in *Probodh Lal v. Harish Chandra*, *supra* that the decision in each case must depend upon the terms of the instrument that if the fulfilment of a certain qualification was a condition precedent to the bequest taking effect then the legatee cannot take unless the condition is fulfilled. The onus of proving that he does not fill the character which is the reason of the gift lies upon the person who disputes his claim(*m*).

77. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

When words may be supplied.

Illustration

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A will take a legacy of five hundred rupees.

[This is sec. 64 of the Succession Act X of 1865. It applies to Hindus.]

Ambiguity upon the Factum of the Will.—If there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, but an ambiguity as to the foundation itself of the instrument, *e.g.*, whether the testator meant a particular clause to be part of the instrument or whether it was introduced without his knowledge. But in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, *the ambiguity must be upon the face of the paper* and the facts alleged and to be proved must *completely* remove the ambiguity. Also, if it is proved that certain words or clauses in the will were inserted by mistake or by fraud without the knowledge of the testator, the Court has power to correct the

(*f*) *In re Marcus*, 56 L. J. Ch. 380.

(*g*) *Re Travers*, 86 L. J. Ch. 123.

(*h*) *In re Taylor*, (1940) W. N. 151.

(*i*) *Herbert v. Reid*, 16 Ves. 481; *Suleman v. Dorab Alikhan*, 8 Cal. 1 (P. C.).

(*j*) *Probodh Lal v. Harish Chandra*, 9 C. W. N. 309.

(*k*) *Bhimava v. Krishtagowda*, 30 Bom. L. R. 908; *Bireshwar v. Arsha Chander*, 19 Cal. 452 (P. C.); *Nidhoomoni v. Saroda*, 3 I. A. 253; *Lali v. Murlidhar*, 28 All. 488 (P. C.); *Khub Singh v. Ramji Lal*, 41 All. 666; *Dhondubai v. Laxmanrao*, 47 Bom. 65; *Subbarayar v. Subbammal*, 24 Mad. 214, 27 I. A. 162; *Moerari Lal v. Kundan Lal*,

31 All. 339; *Lalla Prasad v. Salig Ram*, 81 All. 5; *Venkata v. The Court of Wards*, 1 Bom. L. R. 277 (P. C.).

(*l*) *Karsondas v. Ladvachhu*, 12 Bom. 185 in appeal *Karmst v. Karsondas*, 20 Bom. 718, and (P. C.) 23 Bom. 271; *Fanindra v. Rajeshwar*, 11 Cal. 463 (P. C.); *Shomavahoo v. Dwarakadas*, 12 Bom. 202; *Abbu v. Kuppmammal*, 16 Mad. 355; *In the case of The Court of Wards v. Venkata*, 20 Mad. 167, confirmed in Privy Council *Sri Raja Rao Venkata v. The Court of Wards*, 22 Mad. 383, where the word "Aurssa Son" were held to be merely descriptive.

(*m*) *Rango v. Mudiyeppa*, 23 Bom. 296.

error by omission of words so inserted, but the Court has no power to supply words *accidentally* omitted from a will(n). The Court has also no power to give effect to a hypothetical intention by supplying *lacunae* in the will and thereby making a new will for the testator(o). The rule is now settled that in cases of mistake the Court will *strike* out the words inserted by mistake but will never *insert* a word either as an addition or as a substitution except only to make the meaning of the expression clear by a reference to the context(p). In *Kirkpatrick v. Kirkpatrick*(q) the words "under twenty-one were supplied after the word "issue" in the will which contained a bequest to A and B and in the event of both dying without issue", and in *Radford v. Radford*(r) the words "without issue" were read as "without leaving issue". In *Lang v. Pugh*(s) "on marriage" has been read as "at 21 or marriage" and in *Abbot v. Middleton*(t) the word "dying" has been read "dying without leaving a child". (See also ill. to this section). In *Tarachurn v. Suresh Chander*(u) a contingent bequest "if my son died" was construed "if my son dies during minority". In *Narayani Dasi v. Administrator General*(v) the words "subject nevertheless to the trust of maintaining my said daughter" were construed by the words "in case she were otherwise provided for".

The principle to be observed in all such cases is that the meaning is to be collected from the words used in the will. The expression used in the section is "it may be supplied by the context". Where after giving effect to every word used in the will it is found that the meaning is not clear, in such as case the Court will supply the words to remove the inconsistency in the words used or supply the omission. In such cases parol evidence will not be admitted.

In numerous cases the word "or" has been changed into "and" and *vice versa* (see Halsbury Vol. 34 p. 217).

If in writing the amount of legacy there is a discrepancy between figures and words, the *prima facie* rule is that the words shall prevail, e.g., "I bequeath Rs. (500) (in words) rupees one hundred to A". But this rule must give way to the context and if the context is favourable to the view that the testator intended a uniform amount of legacy to several legates effect will be given to it and the amount mentioned in figure would be accepted as correct in preference to words(w). Where a will contains numbered schedules and the testator refers to one number by mistake for another the mistake may be corrected(x).

78. If the thing which the testator intended to bequeath can

Rejection of erroneous particulars in description of subject.

be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Illustrations

(i) A bequeaths to B "my marsh-lands lying in L and in the occupation of X." The testator had marsh-lands lying in L, but had no marsh-lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh-lands of the testator lying in L will pass by the bequest.

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| (n) <i>Harter v. Harter</i> , L. R. 3 P. & D. 11; | (r) 1 Keen. 486. |
| <i>Morrell v. Morrell</i> , 7 P. & D. 68; <i>Gopal Krishna v. Ramnath</i> , 5 Bom. L. R. 729. | (s) (1842) 1 C. 26 Ch. Cas. 718. |
| (o) <i>Kailar Singh v. Dayal Das</i> , A. I. R. (1930) Pat. 201. | (t) 7 H. L. Cas. 68. |
| (p) <i>In the goods of Walkeley</i> , 69 L. T. 419; <i>In the goods of Schott</i> , (1901) P. 190; <i>Hermasji v. Dhanjishaw</i> , 12 Bom. L. R. 569. | (u) 17 Cal. 122 (P. C.); 169. |
| (q) 13 Ves. 476. | (v) 21 Cal. 688. |
| | (w) <i>In re Hammond</i> , <i>Hammond v. Treharne</i> , W. N. 11-7-38 p. 236. |
| | (x) <i>Hurt v. Tulk</i> , 2 De. G. M. & G. 300. |

(ii) The testator bequeaths to A "my zamindari of Rampur." He had an estate at Rampur, but it was a taluq and not a zamindari. The taluq passes by this bequest.

[This is sec. 65 of the Succession Act X of 1865. It applies to Hindus, etc.]

Misdescription of the Subject of the Bequest.—This section deals with misdescription of the thing bequeathed and the rule is that if the thing can be sufficiently identified, any erroneous addition or error in part of the description shall not vitiate the bequest. If an immoveable property is described in a general manner, it will include all interests legal or equitable, vested or contingent, in possession, reversion, remainder, or expectancy capable of being disposed of by the testator. A description of property by locality does not include property in another locality. If, therefore, the property can be sufficiently identified and the part of the description which is true applies to the property with sufficient certainty, the other untrue part will be rejected(y). If the survey number is wrong it may be rejected(z). The Court of construction observes the following rules:—

(a) Where an object is sufficiently described additional words which have no application to anything may be rejected.

(b) Where there is a complete description and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description, may be rejected.

But there is a limitation to these rules, *viz.*, where the testator has several things and the description applies fully to one of such things and also in part to another of such thing, the bequest shall be limited to the first thing. This subject is treated in the next section. As regards moveable property described in general terms see commentary to section 83.

79. If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any word which would be liable to rejection under section 78 shall be deemed to have been struck out of the will.

Illustrations

(i) A bequeaths to B "my marsh-lands lying in L and in the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest will be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.

(ii) A bequeaths to B "my marsh-lands lying in L and in the occupation of X, comprising 1,000 bighas of lands." The testator had marsh-lands lying in L some of which were in the occupation of X and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The

(y) *Tulsha v. Mathura*, 33 All. 66; *Gully v. Davis*, L. R. 10 Eq. 562. (z) *Santaya v. Savitri*, 4 Bom. L. R. 871.

measurement will be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.

[This is sec. 66 of the Succession Act X of 1865. It applies to Hindus.]

This section is a limitation on the previous section. It lays down that where there is one continuous description of the property and there is something answering to part of it and something answering to another part, but the two together are inconsistent the question is which are the *leading* words of description. For the purpose of ascertaining leading words where a description is followed by restrictive words inconsistent with it, the earlier words will prevail. Where there is a restricted description of property followed by a wider description which would include other property as well, the more restricted description will prevail. In such cases the words of description are construed as words of limitation of the bequest and will pass only that property to which the words exactly apply. (See Halsbury, Vol. 84, p. 227). According to the English rule of construction as laid down in *Goodtitle v. Southern*(a) and *Down v. Down*(b) where an estate is divided by a specific name followed by a reference to occupation, the reference to occupation may be rejected. The illustrations given in this section show a contrary rule to that laid down in the above cases.

80. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Extrinsic evidence admissible in cases of patent ambiguity.

Illustrations

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(ii) A, by his will, leaves to B "my estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

[This is sec. 67 of the Succession Act X of 1865. In the margin the word "patent" appears instead of "latent" as in sec. 67 of the old Act, and it appears to be a misprint. This section applies to Hindus, etc.]

Admission of Extrinsic Evidence : Equivocation.—In the commentary to section 76 it is shown that for the purpose of ascertaining the objects of the testator's bounty evidence is admissible to show facts and circumstances corresponding as far as possible with those referred to in the will. This section limits the admission of extrinsic evidence in the case of *latent ambiguity* only. Where the language of the will, though intended to apply to one person or thing only, applies equally to two or more and it is not possible to gather from the context which was intended, an equivocation arises. The words must be unambiguous and apply to two or more objects of the testator's bounty as in *ill. (i)* or to two or more subjects of disposition as in *ill. (ii)* or the quantity of interest intended to be given. In such cases the Court will admit extrinsic evidence. Oral evidence is also admissible to show circumstances, habits and state of testator's family which would include the names of testator's friends on the principle of justice, equity and good conscience(c).

(a) 1 M. & S. 299.
(b) 1 Moore P. C. 80.

(c) *Janardhan v. Narayan*, 39 Bom. L. R. 1151.

Two conditions are requisite :--(1) that the description applies to two or more persons or things, and (2) that the testator intended only one. An equivocation arises when the description in the will applies to two or more objects or subjects where only one was intended. But if a description partly applies to one and partly to another (*d*), or is wholly inapplicable to any of the persons or things (*e*), extrinsic evidence is not admissible. In *Indar Kunwar v. Jaipal Kunwar* (*f*) their Lordships of the Privy Council declined to receive extrinsic evidence as to whether the words "Maharani Sahiba" applied to the Senior Rani or Junior Rani, and held that the words only applied to Senior Rani and not to both the Ranis. In *Krishnarao v. Benabai* (*g*) the Court declined to construe "children" to mean "sons" as the word "children" was not ambiguous. Extrinsic evidence is not admissible in case of *patent ambiguity*, i.e., an ambiguity on the face of the will, e.g., where blanks are left for names. Oral evidence is not admissible to show who was meant to be inserted.

There are two kinds of ambiguities, one is patent ambiguity and the other is latent ambiguity. The general rule is that parol evidence of the testator's intention is not admissible unless there is a latent ambiguity, e.g., to explain a nick-name (*h*); but where a complete blank is left either for the name of the legatee or the amount of the legacy, no parol evidence will be allowed to fill in the blank, (see *ill. ii*, sec. 81). That is a patent ambiguity.

Words will not be added to give effect to what may be fancied to have been the intention of the testator (*i*).

Evidence of the declaration of a testator as to whom he intended to benefit, or supposed that he had benefited, can only be received where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things. But evidence of circumstances, the habits, and the state of the family at the time he made the will is admissible so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses and whether there exists any person or thing to which the whole description given in the will can be with sufficient certainty applied (*j*). Where a legatee is once correctly described in a will and the same name is mentioned again without any description, evidence is *not* admissible to show that a different person was intended (*k*). (Williams on Executors, 12th Edn., p. 743.)

If there are several persons who accurately answer the whole description, there is an equivocation, and evidence of the testator's intention is admissible (*l*). But if the will shows which of the two persons is meant by the words used no case of equivocation arises and parol evidence is not admissible.

If a legatee has once been accurately described and the same name is afterwards mentioned without the description, evidence is not admissible to show that a different legatee of that name was meant (*m*). If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears a clear intention to the contrary.

If there is a gift by name, with a particular description superadded, and there is some one who answers to the name and some one who answers to the description, no evidence of intention is admissible. In such cases the name will prevail against

(*d*) *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363.

(*e*) *Miller v. Travers*, 8 Bing. 244.

(*f*) 15 Cal. 725, 15 I. A. 127.

(*g*) 20 Bom. 571.

(*h*) *Baylis v. Attorney-General*, 2 Atk. 289.

(*i*) *Gopal Krishna v. Ramnath*, 5 Bom. L. R.

729.

(*j*) *Charter v. Charter*, L. R. 7 H. L. 364.

(*k*) *Webber v. Corbett*, L. R. 16 Eq. 515.

(*l*) *Price v. Page*, 4 Ves. 680; *Miller v. Travers*, 8 Bing. 244; *Charter v. Charter*, L. R. 7 H. L. 364.

(*m*) *Webber v. Corbett*, 16 Eq. 515.

an error in description if it is clear that there is an error in the description. Hence either the name or the description will prevail according as it is reasonably certain that the mistake is more likely to be made in the name than in the description and *vice versa*. If there is nothing to point out one person more than the other, the gift will be void for uncertainty (*n*). (Theobald on Wills, 7th Edn., pp. 267-269).

There is also another class of cases where extrinsic evidence is admissible, *e.g.*, where there is an imputation of fraud in the making of the will. In such cases the declarations of the testator are admissible in evidence respecting his dislike or affection for his relations or those who appear to be the objects of his bounty. Also in cases of alterations appearing on the face of the will declarations made *before* the execution of the will may be admitted, but not the declarations made *after* the execution of the will. In many cases, however, the declarations of a testator made *after* a will has been executed are admissible, and are most important in questions of testamentary capacity and fraud (*o*).

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

81. Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations

(i) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before-mentioned aunt, Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before-mentioned aunt, Mary." The bequest is therefore void for uncertainty under section 89.

(ii) A bequeaths 1,000 rupees to _____ leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(iii) A bequeaths to B _____ rupees, or "my estate of _____". Evidence is not admissible to show what sum or what estate the testator intended to insert

[This is sec. 68 of the Succession Act X of 1865. It applies to Hindus, etc.]

Patent Ambiguity.—This section lays down the rule that extrinsic evidence cannot be admitted in case of patent ambiguity or deficiency, *i.e.*, an ambiguity on the face of the will itself. In other words if the testator has kept his will incomplete evidence can never be given in order to complete it or to add to it or to explain the incomplete portion. But if the portion left blank can be explained by the remaining clauses of the will parol evidence will be admitted. But if there is any ambiguity in the language used the Court should, in interpreting the language, lean towards carrying out the known intention of the testator as far as it can be ascertained from the recitals and from surrounding circumstances. In interpreting ambiguous words the Court should bear in mind the presumption that the testator was not likely to intend to create an intestacy, and should try to prevent an intestacy. But the Court has no power to insert in the will a disposition which is missing, however desirable that disposition may be (*p*).

Examples of Patent Ambiguity

(a) A bequeaths a legacy thus, "to—Price the son of—Price" leaving the Christian name or the surname blank. Evidence will be admitted to show who was meant (*q*).

(n) *Drake v. Drake*, 8 H. L. C. 172.

W. N. 1152; (1938) 2 M. L. J. 1010.

(o) *Nana v. Shanker*, 3 Bom. L. R. 465.

(q) *Price v. Page*, 4 Ves. 680; *In the goods of De Rosaz*, L. R. 2 P. D. 66.

(p) *Kistammal v. Saraswathi Bai*, (1938) M.

(b) A legacy is given to Mr.—or to Lady—. Evidence will not be admitted to show who was meant. This is a case of patent ambiguity(i).

(c) A testatrix made her will on a printed form and after giving certain legacies gave all her estate real and personal unto—and to—own use absolutely and appointed C to pay all her debts and to be executor of her will. The testatrix was illegitimate and left no issue or next-of-kin. The Crown and the executor claimed the residue. *Held*: parol evidence was admissible to prove that the testatrix believed that the effect of the blanks would be to entitle the executor to the residue(s).

(d) A testator by his will directed his executor out of Rs. 500 to disburse petty pensions to such poor “who have been mentioned to him—the executor—by me.” *Held*: there was a deficiency on the face of the will as to the objects of benefit and no extrinsic evidence was admissible and the legacy failed(t).

Meaning of clause
to be collected from
entire will.

82. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Illustrations

(i) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said “I give Black Acre to B, and all the rest of my estate to A.”

[This is sec. 69 of the Succession Act X of 1865 with the omission of the last sentence—“and for this purpose a codicil is to be considered as part of the will”—as being superfluous as codicil is defined under sec. 2 as forming part of the will. It applies to Hindus.]

In interpreting a will the Court should read the will as a whole and consider all the clauses and circumstances and find out the meaning of any clause and the intention of the testator and give effect to it as far as the law permits. The general rule of construction is first to ascertain by an examination of the entire will what is the natural and grammatical meaning of the language used by the testator. The construction of the will is to be made upon the entire instrument and all its parts are to be construed in relation to each other and so as, if possible, to form one consistent whole. (Williams on Executor 12th Edn., p. 685). If there are words here and there which are repugnant to the words by which an intention is clearly expressed they are to be discarded (u). The intention of the testator must be gathered from the language used by the testator throughout the whole instrument. The meaning of any clause is to be collected from the whole will and all parts of the will are to be construed from the entire instrument (v). For this purpose a codicil is to be considered a part of the will. If the meaning to be attached to the words used is doubtful then surrounding circumstances should be taken into consideration (w). The will itself is taken as the dictionary from which the meaning of the words is to be ascertained, however inaccurate such meaning would be in ordinary or legal sense. Where in an earlier clause of the will there is a bequest of all the properties without restriction later clause restricting the bequest should be read as not to be inconsistent with the earlier clause and an endeavour

(r) *Baylis v. Attorney-General*, 2 Atk. 239 ;

Hunt v. Holt, 3 Bro. C. C. 311.

(s) *Re Bacon's Will*, 31 C. D. 400.

(t) *Adm.-General v. Money*, 15 Mad. 448.

(u) *Kanhya Lal v. Musammam Hira Bibi*, 15

Pat. 151.

(v) *Rameswar v. Balraj Kuar*, 37 Bom. L. R. 862 at p. 865. (P. C.).

(w) *Somasundara v. Ganga*, 28 Mad. 386; *Ramchandra v. Vijayaragavulu*, 31 Mad. 349.

will be made to reconcile the inconsistent clauses(x). In *Gulbaji & Co. v. Rustomji*(y) the first clause gave the property to R, in the following words "This is given as a gift to R" but in the later clause the testator directed "should R die and should he then leave a son, such son shall afterwards be the owner thereof." It was held that the first clause gave to R an absolute interest but the two clauses should be read together and their combined effect was to confer only a life interest on R. In *York Smith v. Tribhowandas* (z) it was held that the words "in trust for Tribhowandas and his heirs" if they stood alone would create a fee in Tribhowandas; but the same when read with the words immediately following "to allow him to occupy and use the same and enjoy income thereof and after his death to allow his widow to enjoy the same during her life" showed a clear intention that Tribhowandas should only take a life interest to be followed by the same interest to his widow after whom the heirs of Tribhowandas would take as purchasers. If the words used are ambiguous, contradictory or obscure, the Court adopts that construction which it considers that the testator in the circumstances of the case probably meant by the words in the will, taking into account the general scope of the will and the general purpose of the testator, (Halsbury, Vol. 34, p. 190). Another principle to be observed in construing a will is that the testator did not intend to die either wholly or partially intestate. In other words when the testator has executed a will in a solemn form it must be assumed that he did not intend to make it a solemn farce (a).

83. General words may be understood in a restricted sense

When words may be understood in restricted sense, and when in sense wider than usual.

where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that

the testator meant to use them in such wider sense.

Illustrations

(i) A testator gives to A "my farm in the occupation of B," and to C "all my marsh-lands in L." Part of the farm in the occupation of B consists of marsh-lands in L, and the testator also has other marsh-lands in L. The general words, "all my marsh-lands in L." are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, A (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(iii) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

[This is sec. 70 of the Succession Act X of 1865. It applies to Hindus.]

The *ejusdem generis* rule as to the meaning of general words applies to wills as to other instruments. But this section enacts that this rule is liable to be overridden by the context of the will and general words which follow particular and specific words may be construed in a restricted sense and *vice versa*.

(x) *Anukul Chandra v. Gurupada*, A. I. R. (1936) C. 643.

(y) 49 Bom. 478.

(z) 19 Bom. 401; see also *Mafatlal v. Kanialal*,

17 Bom. L. R. 705; and *Hara Kumari v. Mohun Chandra*, 12 C. W. N. 412.

(a) *Re Messenger's Estate*, *Chaplin v. Ruane*, (1937) 1 All. E. R. 335.

Business and Good-will.—A bequest of testator's "business" or of his share in a business *prima facie* includes his interest in all the assets including book debts and stock in trade in addition to the goodwill (*b*), but the context may exclude any item such as book debts or stock or land where it is carried on. (Halsbury, Vol. 28, p. 699, Hailsham Edn. Vol. 34, p. 246). A bequest of a goodwill and business does not pass the capital in the business, nor book debts, nor stock-in-trade (*c*). The construction depends on the context and surrounding circumstances (*d*). In this case a testator bequeathed his business as a solicitor and the office furniture, law books and the other articles of his office to his managing clerk and gave the residue to charity. After the date of the will the testator made the managing clerk his partner and gave him half share of profits. On a summons to determine what passed to the legatee, it was held that the bequest was not deemed by the partnership agreement and that the legatee was entitled to all the assets and moneys employed in the business including undrawn profits, capital, loans made to clients and not merely the good-will of the business.

Debts.—In addition to the ordinary meaning, under a bequest of "whatever debts may be due to me at the time of my death," cash balance in his banker's hands will pass and bill of exchange drawn in testator's favour (*e*). Similarly under a bequest of "all and every sum of money which may be due to me at my decease" will pass damages recovered in an action by an executor for breach of covenant committed in the testator's lifetime (*f*), and money receivable under a policy of insurance on the testator's life (*g*). A gift to A of a debt due from him means a debt due from him *solely*, if there is such a debt, and not a debt due from the firm to which A belongs (*h*). A direction that a debtor is to be released from all claims in respect of moneys "now owing" to the testator, and all other moneys due from him, will release the debtor from advances made subsequent to the date of the will (*i*).

A bequest of a debt due to the testator from A means a debt due to the testator *alone*, and not the testator's share of a debt due from A to the testator's firm (*j*).

Effects.—Primarily the word refers to personal or moveable property but in *Hogan v. Jackson* (*k*), the word "effect" was held to pass the freehold interest in land. In *Campbell v. Prescott* (*l*) it was held to pass the whole of the residuary estate. In *Vertannes v. Robinson* (*m*) it was held that on a true construction of the will the word "effects" did not include immoveable property. A bequest of "my personal effects in my room including pictures, roll top desk and chiffonier complete with their contents" was held only to pass such things as could be properly treated as personal effects and not the bank pass book in the roll top desk (*n*). (See also Halsbury Laws of England Vol. 34 p. 247).

Etc.—For construction of the word "etc," see *Stuart v. Bute* (*o*). The words "whatever may remain over" were held to include the whole of the estate including property acquired after the date of the will (*p*).

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| (b) <i>In re Spence, Wilkinson v. Arlow</i> , (1938) N. I. 83. | (i) <i>Everett v. Everett</i> , 7 Ch. D. 428. |
| (c) <i>Delany v. Delany</i> , 15 L. R. Ir. 55; <i>Blake v. Shaw</i> , Johns. 732. | (j) <i>Maybery v. Brooking</i> , 7 De. G. M. & G. 673. |
| (d) <i>In re Rhagg, Eastern v. Boyd</i> , (1938) 1 Ch. 828. | (k) (1775) 1 Cowp. 299. |
| (e) <i>Carr v. Carr</i> , 1 Meriv. 541. | (l) 15 Ves. 507. |
| (f) <i>Bide v. Harrison</i> , L. R. 17 Eq. 76. | (m) 29 Bom. L. R. 1017 (P. C.). |
| (g) <i>Petty v. Wilson</i> , L. R. 4 Ch. 574. | (n) <i>Joseph v. Phillips</i> , (1934) A. C. 348 = A. I. R. (1934) P. C. 125 = 67 M. L. J. 241 P. C. |
| (h) <i>Ex-parte Kirk, Re Bennett</i> , (1877) 5 C. D. 800. | (o) 1 Dow, 73; 11 Ves. 657. |
| | (p) <i>Abdulsakur v. Abubakar</i> , 32 Bom. L. R. 215; 54 Bom. 358. |

Estate.—Where this word is used in a suitable context, it is a very wide term and is sufficient to include all the testator's moveable and immoveable property, (Halsbury, Vol. 34, p. 248).

Furniture or Household Furniture includes such furniture as is reserved for domestic or personal use such as may contribute to the use or convenience of the householder or the ornament of the house, such as plate, linen, china, both useful and ornamental, and pictures (*q*); but not goods or plate in the possession of the testator in the way of his trade, nor books, nor wines, nor tenant's fixtures, nor horse and carriage, (Williams on Executors, 12th Edn., p. 762). In *Rutherford v. Hall Walker* (*r*) the bequest of furniture and household effects was held to include motor cars, consumable stores, garden implements and tools and moveable plants.

Goods, Goods and Chattels, Household Goods, Household effects, and Household and Personal Belongings. The expression "goods" or "goods and chattels" will include the whole of the moveable property of the testator, such as, stock, bond, notes, money, plate, furniture, etc. The word "belonging" was held to include cash in the house and money at the bank (*s*). "Household Effects" were construed to comprise motor cars, consumable stores, garden implements and household plants (*t*). In *In re Grimwood* (*u*) the word "plate" was construed to include both silver and gold plated articles.

By the expression "household goods" will pass everything of a *permanent* nature, *i.e.*, articles of household use which are not consumed in their enjoyment. But goods in the house, which are also goods in the way of his trade or business will not pass. Pictures, plates, clock, etc., will pass but malt, hops, victuals, guns and pistols will not pass. (See Halsbury, Vol. 34, p. 261).

Jewellery :—In *re Whitby, Public Trustee v. Whitby* (*v*) it was held by the Appeal Court that unmounted diamond passed to the legatee under a bequest of jewellery.

"Money" :—In *Perin v. Morgant* (*w*) the House of Lords held that a bequest of "All moneys of which I die possessed of" included all the net personalty. After reviewing all the previous rulings on the construction of the word "money" it was stated that in its original sense the word "money" means coin; it is equivalent to cash of any sort. A further extension would include debts owing to the testator, money at his banker, cheques which he would pay into his banking account and the like. By a further extension it would include money invested on mortgage or indentures or in stocks and shares or in saving certificates. The definition in *re Hodson* (*x*) where it was held that the word "money" only passed cash and not the savings certificates was held to be a very narrow construction of the word (see p. 415 of the Report). Their Lordships have observed in this case that in the case of wills not drawn by lawyers too narrow an interpretation on the word "money" should not be put and the Court is not bound to adopt a fixed meaning to the word "money" as being its "legal" as opposed to its "popular" meaning: but the Court must ascertain as between various usual meanings which is the correct interpretation of the particular document in the light of the context and other relevant circumstances. In *Sarat Chandra v. Charusila Dasi* (*y*) the word was construed in a wide sense.

(*q*) *Kelly v. Powlett*, Ambli. 605.

(*r*) (1933) Ch. 837.

(*s*) *In re Mills Will Trusts, Marrih v. Mills*, 53 T. L. R. 139.

(*t*) *In re Waverley, (Baron) Rutherford v. Hall Walker*, (1933) 1 Ch. 837; 149 L. T.

418; 49 T. L. R. 515.

(*u*) (1945) W. N. 224.

(*v*) (1944) W. N. 66;

(*w*) (1943) A. C. 399.

(*x*) (1936) Ch. 203.

(*y*) 55 Cal. 918.

Money includes bank notes, money at the bank on current and deposit accounts (z), cash in the house, money in the hands of an agent of the testator, and any money of which at the time of the testator's death, he might have claimed immediate payment (a). So under a bequest of "all my moneys" money due on deposit account at a bank, money at the bank on current account, and also money in the hands of a stakeholder on a bet, cash in the house and moneys in the hands of solicitors were held to pass (b).

But money does not include an apportioned part of an annuity, nor accruing interest, nor a legacy which has not been acknowledged as at the disposal of the testator, nor stock (c).

In some cases a larger sense has been given to the term "money," and it has been held to pass the residuary personal property of the testator (d). And it is also held to include stock (e).

Ready Money will pass money at call at a bank or in the hands of an agent used as a banker (f), but not money on deposit with bankers subject to more than 24 hours' notice of withdrawal (g). It will not pass notes of hand, nor debt due from an agent, nor dividends not declared, nor rent nor interest due on a mortgage (h). Halsbury Vol. 34, p. 258.

Securities.—The word "securities" is very commonly used as a synonym for investment or property dealt with on Stock Exchange. But the normal meaning of the word is a debt or claim the payment of which is in some way secured. The security generally consists of a right to resort to some fund or property for payment; but the word is also used to denote stocks or shares. But in the absence of any aid to interpretation the word "securities" must be construed in strict sense and in the absence of a context stocks and shares do not pass. In *In re Smithers* (i) it was held that by "my securities" stocks and shares of Joint Stock Companies did not pass but Government bonds and stocks passed.

Investments.—This word has acquired a wide construction. Ordinarily a bequest of "my investment" would pass stocks, shares and other securities bearing interest or dividend. In *Wartons Law Lexicon* it is defined as laying out of money. In *In re Price* (supra) Farwell, J., had to consider the meaning of the expression "pecuniary investment" in a will and he made the following observations: "I think that no one in ordinary parlance speaking of money which he puts on deposit account at his bankers at a short call like this—ten days—taking the usual banker's interest which is one per cent below bank rate, would treat himself as making an investment, or as investing in a mode which could be intended by him as an investment to be continued after his death by his trustees 'in its present stage of investment' within the meaning of those words". In *In re Sudlow* (j) Mr. Justice Ewe observed as follows: "There is no express authority which leads me to decide that money on deposit is not an investment Money on deposit can be, in accordance with popular parlance, spoken of as invested. The money placed on deposit at the bank and also the money placed on deposit

(z) *In re Collings*, (1938) Ch. 920=(1938) W. N. 188.

(a) *Byrom v. Brandreth*, L. R. 16 Eq. 475.

(b) *Manning v. Purcell*, 1 Sm. and G. 284; *In re Gates*, *Gates v. Cabell*, (1929) 2 Ch. 420.

(c) *Byrom v. Brandreth*, 16 Eq. 475; *Ommamney v. Butcher*, 1 Turn. & Russ. 280; *In re Mann*, *Ford v. Word*, (1912) 1 Ch. 388.

(d) *Cheda Lal v. Gobind Ram*, 30 All. 455.

(e) See *In the goods of Hand*, 7 Notes of Cas. 60 and other cases cited in foot-note (t) p. 765 *Williams on Executors*, 12 Edn.

(f) *Re Powell's Trusts*, *Johns*. 49; *Fryer v. Ranken*, 11 Sim. 55.

(g) *In re Price*, *Price v. Newton*, (1905) 2 Ch. 55.

(h) *Cooke v. Wagster*, 2 Sm. & G. 296.

(i) (1939) 1 Ch. 1015.

(j) (1914) W. N. 424.

an Army and Navy Stores can, I think, be so spoken of as invested. See also *In re Lewis Will Trusts*(k), where it was held that money on deposit may be investment.

Stocks and Shares.—The construction of these words depends on the facts and the contents of the words of the will. In *Re Everett*(l), it was held that the natural meaning of “stocks and shares” was not all the investments but was limited to stocks and shares of limited companies and, therefore, the stocks and shares in limited companies only passed. In *Re Gifford*, *Gifford v. Seaman*(m) the bequest was of “my war bonds”. The testatrix had no war bonds at the date of the will but she had some war bonds which were converted into consolidated stock. After the date of her will she purchased some National Savings Certificates and defence bonds. It was held applying the rule of *false demonstration non-nocet* that the consolidated stock passed under the bequest of “my war bonds” but not the national savings certificates and defence bonds.

Securities for Money will not pass a balance on current account at the bank, money on deposit account, shares, bank stock, mere debts, or money lent on mortgage where the legal estate is in the hands of trustees, and the testator is entitled only to the residue after certain payments(n).

But it passes a lien for unpaid purchase money, consols, and money lent on mortgage, the right to receive which is in the testator, and railway debenture stock(o). (See Theobald on Wills, 7th Edn., pp. 202, 208; Halsbury, Vol. 34, p. 259).

84. Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

Which of two possible constructions preferred.

[This is sec. 71 of the Succession Act X of 1865. It applies to Hindus, etc.]

Where the will admits of two constructions fairly open, *i.e.*, where there is something like “what might be called an ambiguity, then the more reasonable of the two ought to be adopted, that is, you must not attribute caprice to a testator when it can be avoided but nobody has said that the law prohibits a capricious gift being carried into effect”(p). In such cases that construction should be adopted which would give effect to the more reasonable and probable intention of the testator, having regard to the scheme of his will and the circumstances of the testator(q). Where the language of the will is conflicting, the Court attempts to reconcile successive provisions of the will; but where that course would lead to some absurdity or inconsistency with the declared intention of the testator, collected from the whole of his will, the Court will give to the words used their grammatical or technical meaning, (Halsbury, Vol. 34, p. 192). If the language used in the will admits of two constructions, according to one of which the property disposed of will go in a rational manner and according to another in an irrational and inconvenient course, the Court leans towards the former. But if the words used are unambiguous they cannot be departed from

(k) (1937) 1 Ch. 118.

(l) (1944) 1 Ch. 177.

(m) (1944) 1 Ch. 186.

(n) *Lewis's Will Trusts*, *O'Sullivan v. Robbins*, (1937) 1 Ch. 118; *Hopkins v. Abbott*, L. R. 19 Eq. 222; *Mayne v. Mayne*, (1897) 1 Ir. R. 324; *Hudleston v. Gouldsbury*, 10 Beav. 547.

(o) *Ogle v. Knipe*, 8 Eq. 434; *Bescoby v. Pack*, 1 Sim. & Stu. 500; *Ex-parte Barber*, 5 Sim. 451; *Callow v. Callow*, 42 Ch. D. 550.

(p) *Johnson v. Crook*, L. R. 12 Ch. D. 539 cited in *Bachman v. Bachman*, 6 All. at p. 590.

(q) *Maharani Indar Kunwar v. Maharani Jaipal Kunwar*, 15 I. A. 127.

merely because they lead to consequences which are considered capricious or even harsh or unreasonable(r). If the words are clear and involve no inconsistency or contradiction with the other parts of the will those clear words must prevail(s).

No part rejected,
if it can be reason-
ably construed.

85. No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

[This is sec. 72 of the Succession Act X of 1865. It applies to Hindus, etc.]

In construing a will it must be read as a whole and each clause must be taken in conjunction with and interpreted by the other portions of the instrument.

Words of a will are not to be rejected unless one cannot by any possibility give them a rational construction(t). The Court should give effect to every word of the will provided an effect can be given to it, if that is possible and lawful. No word that has a clear and definite operation in the disposal of the testator's property should be struck out(u). Full effect should be given to every portion of the will unless it makes the provisions of the will inconsistent with each other, or leads to results which must be repugnant to the testator's ideas of propriety(v). Attempt should be made to reconcile apparent inconsistencies; but if that is not possible and if the different clauses cannot be reconciled then only sec. 88 should be applied(w) e.g., if land is given to A in fee and afterwards in the same will the same land is given to B for life both parts of the will will stand and the will will be construed as B for life and then to A absolutely(x).

86. If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

Interpretation of
words repeated in
different parts of
will.

[This is sec. 73 of the Succession Act X of 1865. It applies to Hindus, etc.]

Use of same Words in Different Passages.—The ordinary rule of presumption is that a word used in one part of the will with some clear and definite meaning, the use of the same word in another part of the will is intended to mean the same thing(y). But the force of the context may give different meanings to the same words used in different parts of the will(z). In *Jairam v. Kessowjee*(a) a testator declared that if he should get a son that son should be the "owner" of the residue and if no son was born his wife should be the "owner", it was held that the word "owner" was used in the same sense in both the places and had the effect of passing an absolute estate. In *Krishnarao v. Benabai*(b), the word "children" was held to apply to sons as well as to daughters in all the clauses of the will. In *Biprasad v. Sadhan Chandra*(c) the word "arpan" (give) was used in favour of a bequest to a son as well as to the daughter and the bequest was held to be absolute both to the son as well as to the daughter.

Contrary Intention.—This rule will not apply where the contrary intention appears to be clear; but to prevent the operation of this rule the contrary inten-

(r) *Abbott v. Middleton, Ricketts v. Carpenter* (1858) 7 H. L. Cas. 68.

(s) *Bachman v. Bachman*, 6 All. 583 at p. 590.

(t) *Chambers v. Brailsford*, 19 Ves. 652.

(u) *Hall v. Warren*, 9 H. L. Cas. 420.

(v) *Ramachandra v. Vijayaragavulu*, 31 Mad. 349.

(w) *Mokshada v. Surendra*, 68 C. L. J. 22.

(x) *Doe v. Davies*, 4 M. & W. 599, *Anukul v. Gurupada*, A. I. R. (1936) C. 643.

(y) *Edwards v. Edwards*, 12 Beav. 97; *Re Birks*, (1900) 1 Ch. 417.

(z) *Balkin v. Balkin*, 7 Cal. 218 at p. 224.

(a) 4 Bom. L. R. 555.

(b) 20 Bom. 571.

(c) 56 Cal. 790.

tion must be strongly indicated(*d*). This rule also will not apply and the Court is not precluded from putting a different construction upon the same words when applied to different subject-matters(*e*). The word "malik" as applied to the widow was held to indicate only a life estate, but as applied to the adopted son was interpreted to denote an absolute interest(*f*).

Testator's intention to be effectuated as far as possible.

87. The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration

The testator by a will made on his death-bed bequeathed all his property to C D for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 118 but it will take effect so far as regards the gift to C D.

[This is sec. 74 of the Succession Act X of 1865. It applies to Hindus, etc.]

The rule laid down in this section is that if the intention of the testator cannot be carried out to its full extent on account of operation of law, the Court of construction will attempt as far as possible to give effect to it partially. The construction of the will is in the first place considered quite apart from the question of the legality of the provisions of the will. For the purpose of ascertaining the intention, the will is to be read as a whole without reference to the consequences if any rule of law is transgressed. After the intention is once collected then the rule of law should be applied to ascertain, if the Court can carry out the intention either wholly or in part. If it appears to the Court that according to one construction to give effect would be to offend against some rule of law but according to another it is fairly capable to give effect partially and would avoid the legal objection, the latter is presumed to be the intention of the testator. The Court has an inclination to believe, if reasonably possible, that the testator did not intend to transgress the law, (Halsbury, Vol. 28, pp. 667-668). On the same principle when there is an attempt to create a perpetuity or to establish a line of succession unauthorised by law and at the same time there is an intention to benefit the first taker by an interest for life, effect can be given to such intention, although the remainder of the gift is void(*g*).

The last of two inconsistent clauses prevails.

88. Where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A." B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

[This is sec. 75 of the Succession Act X of 1865. It applies to Hindus, etc.]

If in the same will there are two inconsistent and irreconcilable gifts, and there is nothing else in the will to assist the Court in determining the question, the latter clause is to prevail as being the last expression of the testator's wish(*h*).

(*d*) *Harvey v. Harvey*, 32 Beav. 445.
(*e*) *Forth v. Chapman*, 1 P. Wms. 687.
(*f*) *Punchoo Money v. Troylucko*, 10 Cal. 842.

(*g*) *Tagore v. Tagore*, 9 Beng. L. R. 377.
(*h*) *Advocate-General v. Hormasji*, 29 Bom. 375.

Before resorting to this rule the Court will endeavour to reconcile the apparently inconsistent dispositions and attempt to read the will as a whole and where it is not possible to reconcile all the parts then only the last clause shall prevail(*i*). This rule is to be applied strictly and the two inconsistent clauses must refer to the same subject-matter; the rule is not to be applied where the two clauses are intended to provide for different circumstances(*j*), e.g., if in the first clause of the will the property is given to A and in the subsequent clause it is given to B for life, in such a case both the clauses will be given effect to and the construction will be that the bequest will be to B for life and then to A absolutely(*k*). Again both the clauses must be absolutely irreconcilable, see in *ill.* (*i*) the words "not to A." Therefore, if a testator in the first part of his will devises his land to A absolutely and in another part he devises the same land to B. A and B will both take the property jointly(*l*). (Halsbury, Vol. 34, p. 218). In *Vithal v. Narayan(m)*, the earlier part of the will gave the property to the widow absolutely but a subsequent clause in the same will gave a part of the same property to another, the last clause was given effect.

Cannot possibly stand Together.—The effect of these words is that the rule laid down in this section is never to be applied except on the failure of every attempt to give to the whole will such a construction as will render every part of it effectual(*n*). Where the two clauses are not antagonistic but are mutually explanatory to each other the same will be read in that sense. If they are intended to provide for different circumstances the rule will not apply(*o*).

Will or bequest
void for uncertain-
ty.

89. A will or bequest not expressive of any definite intention is void for uncertainty.

Illustration

If a testator says "I bequeath goods to A," or "I bequeath to A," or "I leave to A" all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath 'money,' 'wheat,' 'oil,' " or the like, without saying how much, this is void.

[This is sec. 76 of the Succession Act X of 1865. It applies to Hindus, etc.]

Of Uncertainty

Where the words of a will, aided by evidence of material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended and the will will be void for uncertainty. That is the first part of the section where it says that a will "not expressive of any definite intention is void for uncertainty". The same rule applies where there are more than one will, e.g., if two inconsistent wills are found of the same date, or without any date, and if no evidence is forthcoming which was the last, both wills will be void for uncertainty and the deceased must be considered to have died intestate.

Where the object of a testator's bounty or the subject of disposition is described in items which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the person or thing so described was intended by the testator. But if notwithstanding such attempts, the language of the will is so equivocal or obscure as to leave the testator's intention difficult

(i) *Rameswar v. Balraj Kuan*, 37 Bom. L. R. 862 at p. 865.

(j) *Damodardas v. Dayabhai*, 22 Bom. 833.

(k) *Doe v. Davies*, 4 M. & W. 599; *Gulabaji & Co. v. Rustomji*, 49 Bom. 478; *Somsundara v. Gunga*, 28 Mad. 386.

(l) *Ridout v. Poin*, 3 Atk. 486.

(m) A. I. R. (1931) Nag. 69.

(n) *Amirthayyan v. Ketha ainayyan*, 14 Mad. 65 at p. 70.

(o) *Damodardas v. Dayabhai*, 22 Bom. 833 (P. C.)

to ascertain, the bequest will be void for uncertainty. That is the second part of the section where it is stated that a bequest not expressive of any *definite* intention is void for uncertainty.

The word "definite" used in the section requires that to the validity of every disposition there should be a definite subject, and a definite object, and uncertainty in either of these particulars is fatal.

Now uncertainty in the terms in which the testator expresses his intention is one thing and uncertainty as to the period at which the legatee will be entitled to the bequest is another. In the former case if two constructions are open, the more equitable should be preferred and the will will be construed accordingly: in the other the mere introduction of the element of chance should not interfere to prevent the Courts from carrying out such intention. The "uncertainty" dealt with in this section is of the type which makes the will or bequest absolutely unintelligible as in the illustration given in this section. See also *ill. (c)* to Sec. 6 of the Indian Trusts Act.

Uncertainty of Subject of Bequest.—It is essential to the validity of a bequest that the subject-matter be described in definite terms. If it is described in vague and general terms, *e.g.*, where the subject of disposition consists of an indefinite part or quantity the gift will necessarily fail for uncertainty.—Examples of such void bequests are *Bland v. Bland*(*p*) where a bequest is of what shall remain at the death of the prior legatee or what the prior legatee can save(*q*), or the bequest is of an indefinite amount, *e.g.*, a bequest of "some of my linen"(*r*). In all such cases where the quantity or the amount of the bequest is left indefinite, the bequest will be void for uncertainty. But if the will indicates some reasonable grounds for ascertaining the amount of the gift, the Court will try to ascertain it, *e.g.*, a bequest "to A of £ 500 or £ 100" will be construed in favour of the legatee as a gift of the larger sum(*s*). Also a gift of "a sum of money to an executor for his trouble" is good and the Court will fix the amount(*t*). In such and the like cases if there is some basis for calculating the amount the Court will estimate the amount intended to be bequeathed. But where there is no basis of calculation the gift will be void(*u*). In *Jamnabai v. Khimji*(*v*) the purpose indicated in the will was to establish a Sadavarat at Nasik but the amount to be expended for that purpose was not mentioned, but it appeared from the will that it was to be on the same scale as one carried out at Anjar and the gift was upheld.

Right of Selection.—Sometimes the testator gives to the legatee an express right of selection of a portion out of the larger portion of the subject of bequest. In such a case when a gift comprises a definite portion of a larger quantity it is not rendered nugatory by the omission of the testator to point out the specific part which is to form a portion. The legatee in such a case is entitled to select, *e.g.*, where a testator gave his wife power to appropriate absolutely to herself such part of his furniture as she should desire to have, she may take the whole(*w*), or where the testator has three houses in a certain street and he bequeaths two of these to A without meaning which two A is to select(*x*). In *In re Knapton*(*y*) a bequest was, "One house to each of my nephews and nieces and one to Nellie, one to Florence, one to my sister and one to my brother. It was held that the bequest was not void for uncertainty and the right of selection went in the order

(*p*) 2 Cox. 349.

(*q*) *Cowman v. Harrison*, 22 L. J. Ch. 993.

(*r*) *Peck v. Halsey*, 1 P. Wms. 387.

(*s*) *Scale v. Scale*, 1 P. Wms. 290.

(*t*) *Jackson v. Hamilton*, 3 Jo. & Lat. 702;

Gokool Nath v. Issur Lochun, 14 Cal. 222;
Surbomungola v. Mahendronath, 44 Cal.

508.

(*u*) *Abraham v. Alman*, 1 Russ. 309.

(*v*) 14 Bom. 1.

(*w*) *Re. Sharland*, 74 L. T. 164.

(*x*) *Tapley v. Eagleton*, 12 Ch. D. 683.

(*y*) (1911) 1 Ch. 428.

in which the legatees were named in the will, and the right of selection was to be determined by lot. In *Narayanasami v. Periatambie*(z), the gift was of "one Kani land in Snubili land" and it was held that the devisee had the right to choose. This rule, however, will not apply if the testator intends to give a particular property to a legatee but owing to his having several properties answering the description in the will it is not possible to ascertain either from the will or from extrinsic evidence which property was meant(a) nor will the Court transpose the words to give a meaning, e.g., if the words used in the will are "I leave and bequeath to all my children share and share alike", the Court will not transpose the words "to all my children" as "all to my children"(b). But if the bequest is "not exceeding £ 100" or "£ 50 or £ 100" it will be construed in a manner most beneficial to the legatee and is a gift of £ 100(c).

Uncertainty of Objects.—Uncertainty in regard to the objects of a bequest arises either from the testator having described such objects by a vague term or if a definite class is the object of the bequest, it is intended that all the members of the class are not to take the gift, e.g., a gift to one of the sons of A is void for uncertainty, though only one son may be alive at the testator's death and parol evidence is not admissible to show which of the sons was intended(d). (Theobald on Wills, 7th Edn., p. 758). Gifts which may have two or more alternative meanings where there is nothing in the context or otherwise to assist the Court in dissolving the ambiguity are also void, e.g., a bequest to "my heirs or next of kin"(e), or "a gift to A and afterwards to B"(f), or "a gift to a son of L. or of G."(g). But see illustrations to sec. 96. In *In re Lewis, Goronway v. Richards* (All E. R. 5th September 1942) a testator bequeathed the residue to his wife for life and in the event of her predeceasing him then to Margaret and/or John. The wife predeceased the testator. In a summons for direction by the executors whether the gift was void for uncertainty, it was held that M. and J. took as joint tenants.

Uncertainty as Applied to Charities.—The Court adopts a benevolent rule and allows some latitude in cases of gifts to charities described in general or uncertain terms and that rule is that if the bequest is purely and wholly charitable not mixed up with any other object the Court will give effect to it(h). But if the charitable objects are mixed up with other objects, e.g., "charitable or benevolent" or "charitable or pious" or "charitable or philanthropic" or "charitable or public", the gift will fail for uncertainty(i). The reason for the decisions of the English Courts upon such devises or bequests is stated by Lord Eldon in *Morice v. Bishop of Durham* in the following words: "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control, so that in case of breach of trust the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust; a trust, therefore, which, in case of maladministration could be reformed and due administration directed; and then, unless the subjects and objects can be ascertained, upon principles familiar, in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration". This decision has been quoted and followed in India(j). Adopt-

(z) 18 Mad. 460.

(a) *Asten v. Asten*, (1894) 3 Ch. 260.

(b) *Mohun v. Mohun*, 1 Sw. 20.

(c) *Thomson v. Thompson*, 1 Coll. 395.

(d) *Strode v. Russell*, 2 Vern. 621; *In the Goods of Blackwell*, (1877) 2 P. D. 72.

(e) *Lowndes v. Stone*, 4 Ves. 649.

(f) *Percy v. Percy*, 24 Ch. D. 616.

(g) *Nakhshetramali v. Brajendra*, 12 Pat. 708 at 715.

(h) *Smith v. Massey*, 30 Bom. 500; *Parbati*

v. Ram Barun, 31 Cal. 895; *Gordhandas v. Chunilal*, 30 All. 111.

(i) *Morrice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Blair v. Duncan*, (1902) A. C. 37; *Da Costa, Re Clarke v. Church of England Collegiate School of St. Peter*, (1912) 1 Ch. 37.

(j) *Ranchordas v. Parvatibai*, 23 Bom. 725 P. C. (in appeal from *Vandravandas v. Cursondas* 21 Bom. 646.)

ing this principle the High Courts have in similar cases declared several charitable trusts as void for uncertainty and vagueness, the typical example of such trusts being the trusts for "Dharam" held to be void by their Lordships of the Privy Council in *Ranchurdas v. Parvatibai(j)*, the word "Dharam" being too vague. But if there is any indication in the will of a general charitable disposition the Courts will uphold such bequests.

Another rule is that a Court cannot make a new will for the founder of the trust if he has left his language vague or uncertain(k). In *In re Horrons(l)*, the words used were "charitable or benevolent" and it was argued that the word "or" was a typist error for "and" but the Court held that it had no jurisdiction to alter the word because so to do would be to make a new will for the testator.

Examples of Charitable Bequests which were held void for Uncertainty.

—In *Bai Chadanbai v. Dady(m)*, a testator directed that after the death of his wife his trustees should bestow a certain property of his and the income thereof "upon some one or more charitable, educational or other philanthropic institution calculated to promote the public good as they shall in their discretion select and it was held to be void. In *Tricumdas v. Haridas(n)* a bequest by a testator of the residue of his property was as follows, "As to whatever immoveable and moveable property belonging to me in excess or may remain over as surplus my abovenamed executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of charity", It was held to be bad for uncertainty(o). In *Harilal v. Manjoola(p)* a bequest to "religious, educational or philanthropic purposes" was held to be void. A bequest for "a building for Hindus exclusively for general purposes to be erected on the land bought by me" was held to be void for uncertainty(q). A bequest to perform "Sara Kam" (good works) was held to be void for uncertainty(r). In *Dayabhai v. Chamanlal(s)* a bequest of money to be applied *sare marge* or for *punya danma* or *sare marge dharmada* as the trustees might think proper was held to be void for uncertainty. In *Sakarbai v. Hazarilal(t)* a bequest for *punya karya* (for pious acts) was held to be void for uncertainty. In *Surbomungola v. Mohendranath(u)* a testator directed his executor "to lay out and expend such portion (of his estate) as my said executor may in his discretion think necessary and proper in and towards the construction and erection of a pucca bathing ghat at a suitable place in the river Hooghly.....and two temples for *seva* for whose worship a monthly allowance will be made by my executor the amount whereof shall be made in his absolute discretion"; it was held that the trust was void for uncertainty. In *Venkata v. Subba Rao(v)* a Hindu bequeathed a certain sum of money to be spent every year "either for the spread of the Sanskrit language or for the spread of Hindu religion or for both"; it was held that the bequest was void for uncertainty. In *Sarat Chandra v. Pratap Chandra(w)*, a bequest of a certain sum "to be applied in supporting the blind and the destitute and for imparting education, in removing marriage difficulties or in works of public good, etc.," was held to be void. In *Dinanath v. Hansraj(x)* a testator directed as follows, "I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised"; it was held that the bequest was void for uncertainty. In *Prabhakuberbai v. Kusumbabai(y)*

(j) *Ranchordas v. Parvatibai*, 23 Bom. 725 P. C. (in appeal from *Vandrayandas v. Cursondas*, 21 Bom. 646.)

(k) *Grimmond v. Grimmond*, (1905) A. C. 124.

(l) (1939) P. 198.

(m) 26 Bom. 632.

(n) 31 Bom. 583.

(o) See also *Surbomungola v. Mohendranath*, 4 Cal. 508 to the same effect.

(p) 39 Bom. L. R. 901.

(q) *Chimabai v. Maneckbai*, 34 Bom. L. R. 609=A. I. R. (1932) B. 451.

(r) *Bapi v. Jamnadas*, 22 Bom. 724.

(s) 40 Bom. L. R. 418.

(t) 58 Cal. 1025.

(u) 4 Cal. 508.

(v) 46 Mad. 300.

(w) 40 Cal. 232.

(x) 62 Cal. 190.

(y) (1940) Bom. 761; 42 Bom. L. R. 327.

the will of a Hindu contained the following clause, "As regards whatever residue of my estate that may be left after setting apart the aforesaid sums and after giving away the legacies my executors shall utilise all that residue of my estate for the purpose of education or for rendering help to the poor or for any other purpose of public service (*lokopyogi*) deemed proper at my native place Chotila in Kathiawar in memory of myself, my respected father and my respected mother". It was held that there were no words before the expression *lokopyogi* which disclosed a general charitable intention and the bequest failed. In *Vedabala Devi v. O. T. of Bengal*(z) a bequest in the following words, "The Official Trustee shall make expenses in works of public utility and for helping individuals and families in miserable circumstances" was held to be void for uncertainty.

Benevolent Purposes :—It was recently observed by their Lordships of the Privy Council that on the use of the word "benevolent" many testamentary bequests have been shipwrecked. The earliest case is *Morice v. Bishop of Durham*(a). In that case a bequest to trustees to be spent by them at their absolute discretion upon the objects of liberality or benevolence or for purposes of general utility or for hospitality and charity was held to be void for uncertainty. The latest decision is *Attorney-General of New Zealand v. The New Zealand Insurance Co. Ltd.*(b) where their Lordships made the following observations, "Now it is settled beyond dispute that a bequest by a testator in favour of benevolent objects to be selected by his trustees does not answer this requirement (requirement of definiteness) and is ineffectual because of its indefiniteness." In the present bequest (which was in the following terms) "to apply the residue towards institutions, societies or objects established in or about Auckland for charitable, benevolent, educational or religious purposes..... as the trustees in their absolute discretion shall deem advisable" the fatal word "benevolent" occurs on which so many testamentary dispositions have been shipwrecked but it is urged that the bequest is saved by the fact that it is in favour of benevolent purposes at large but is in favour of "institutions, societies or objects in or about Auckland for benevolent purposes." But it was held that even assuming that the only existing organisations were included it still remained to predicate of an institution, society or object in or about Auckland that it must be benevolent is not to identify it with the requisite precision and the bequest was void for vagueness.

Dharam or Dharmada :—The word "dharam" is derived from the Sanskrit word "Dri" which means obligation and duty. Its dictionary meaning is "law, virtue, legal or moral duty" and in *Ranchordas v. Parvatibai*(c) their Lordships of the Privy Council held that the word being too vague the gift was void for uncertainty. Amongst other meanings it means advancement of religion, charity and benevolence(d). In *Lakshmi Shanker v. Vajinath*(e) there are observations that a devise to "Dharma" is void because the word "dharama" without any qualifying expression is too vague to constitute valid gift to charity. In *Morarji v. Nenbai*(f) a gift to "dharma" was held to be bad. In *Deoshanker v. Motiram*(g) a bequest to be expended on "dharmada" was held to be void and in *Shambai v. Goverdhan*(h) a bequest for "dharmao kam" was held to be void. But if the word "dharma" is used in conjunction with other words denoting a general intention to charity the bequest will be held to be good(i). In *Abdul*

(z) 62 Cal. 1062; 39 C. W. N. 1154.

(a) 9 Ves. 390; 10 Ves. 521.

(b) 41 C. W. N. 321; (see also *Chichester Diocesan Funds v. Wintle*, (1944) W. N. 173.

(c) 23 Bom. 723 (P. C.).

(d) *Adv.-General v. Damothar*, 1 Bom. H. C. R.

76 (foot-note).

(e) 6 Bom. 24.

(f) 17 Bom. 351.

(g) 18 Bom. 136.

(h) A. I. R. (1925) S. 195.

(i) *Vaidyanatha v. Swami Natha*. 26 Bom. L. R. 1121.

Sakur v. Abubaker(j) a bequest for "dharmakriya" by a Cutchi Memon was upheld (for further commentary see Commentary to sec. 118).

Khairat :—A bequest to "Khairat" was held to be void for uncertainty(k).

Examples of Valid Charitable Bequests.—In *Gangabai v. Thavar Mulla(l)* the will of a Khoja directed that a certain fund "be disposed of in charity as my executor shall think right." It was held to be a valid charitable bequest. In *Advocate-General v. Hormusji(m)* a bequest of a certain sum of money to the trustees upon trust to be expended by them for such charitable purposes as they may think fit was held to be good. In *Smith v. Massey(n)* a bequest to trustees to be used by them 'in such charities as the trustees may think deserving' was held to be good. In *Advocate-General v. Jimababai(o)* the testator directed his executors to set apart Rupees three lacs and to invest them in Government Securities and to spend the sum in connection with some good works or charity in such manner as they might think just and proper, such as hospital, sanatorium, suvavadkhana, (maternity home), musafarkhana, madressa, etc., was held to be good. In *Manorama v. Kali Charan(p)* a direction to the executors to set apart a specific sum for distribution among the testator's "poor relations, dependents, and servants" was held to be good. In *Rajendra v. Raj Coomari(q)* a direction to the executors to spend the income of a certain fund in feeding the poor and indigent was held to be good. In *Parbati v. Ram Barun(r)* a Hindu will contained the following residuary clause, "And as to the rest and residue of my estate I give and devise the same to my executors in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper." It was held to be valid.

Consequences of a bequest being held void for uncertainty.—If a bequest is held void for uncertainty its effect is that the property reverts to the estate of the deceased and will fall into the residue if there is a residuary clause in the will. Questions arise what happens if the claim of the legatee or of the heir is barred by limitation. Can the executors in such a case set up an adverse title and claim the property as their own? Such a question recently arose(s) where a charitable trust purported to be created by will was held void for uncertainty but it was held that the executor of the will had by his conduct dedicated the property to charity and that after twelve years of adverse possession the title to it had vested in charity. See also *Fazlehussein v. Mahomedally(t)* where a Wakf was void but it was held that the trustee could not be permitted to assert an adverse title on his own behalf.

90. The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Words describing subject refer to property answering description at testator's death.

[This is sec. 77 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section is taken from section 24 of the English Wills Act, 1837.

- (j) 54 Bom. 358.
(k) *Mariambai v. Fatmabai*, 31 Bom. L. R. 135.
(l) 1 B. H. C. R. 71.
(m) 29 Bom. 375.
(n) 30 Bom. 500.
(o) 41 Bom. 181.

- (p) 31 Cal. 166.
(q) 34 Cal. 5.
(r) 31 Cal. 895.
(s) *Lala Hemchand v. Lala Peary Lal*, 69 I. A. 137; 45 Bom. L. R. 27.
(t) (1943) Bom. 495.

A will should not be so construed as to lead to intestacy with regard to some part of the testator's property unless the wording makes it necessary to do so but it must be construed with reference to the property of the deceased comprised in it to speak and take effect as if it had been executed immediately before the death of the testator and as if the conditions of things to which it refers is that existing immediately before the death of the testator(u), unless a contrary intention appears by the will, e.g., in the will there is annexed a schedule of properties in the possession of the testator at the time of making the will and if the testator has acquired additional properties at the date of his death, the appending of the schedule to the will is no indication that the testator intended to dispose of those properties only(v). This section has no application to the description of the legatee but only applies to the description of the subject of bequest.

Where a thing bequeathed is generic and may increase, diminish or otherwise change during the testator's life so that the description may from time to time apply to different amounts of property of like nature or to different subjects, then the effect of this section is that the property answering the description at the death of the testator passes under the gift, e.g., *In re Russell*, (w), where the testator who was at the date of his will entitled to a third share in a partnership business bequeathed his interest in the partnership and subsequently acquired the entire business of the firm, it was held that the whole of the testator's interest in the business at the time of his death passed. A bequest of "all my stock-in-trade and debts accruing therefrom" will pass any additional stock-in-trade purchased by the testator after the date of the will(x). A general bequest of all the testator's goods in a particular house or place will pass all the goods found there at the time of his death though not there at the date of the will(y). A general devise of "my lands" was held to pass the land contracted to be purchased but not actually conveyed(z).

Contrary Intention.—No contrary intention is shown by the mere use of a possessive adjective, e.g., "my stock"; but such a possessive adjective may be an indicator that the gift is not generic(a). Even the word "now" does not always imply a contrary intention(b). The intention must be gathered from the text of the will(c). (Halsbury, Vol. 34, pp. 286-288.) In case of a bequest of a specific thing if the testator showed a clear intention to dispose of such goods as belonged to him in a particular place at the date of his will, property afterwards brought there would not pass(d). Where the bequest is of a specific sum of stock in the funds and the testator subsequently sells it away and purchases other stock of precisely similar amount the bequest will not include such latter stock(e). See also sec. 166. A gift of a house "I now live in" was held to be a gift of specific property and to refer to the house occupied by the testatrix at the date of her will(f). In *Re Whitby, Public Trustee v. Whitby*(g) the word "now" was construed as indicating a contrary intention and only those articles passed which were deposited in the safe deposit at the date of the will. But if such words as "now occupied by me" are merely added as an additional description not intended to cut down the generic description the devise will not be restricted to property belonging to the testator at the date of the will so as to exclude after-acquired property(h). The use of the present tense, e.g., a devise

(u) *Bodi v. Venkataswami*, 38 Mad. 369.

(v) *Rathnathammal v. Arulanandam*, A. I. R. (1946) M. 12.

(w) 19 Ch. D. 432.

(x) *Goodlad v. Burnett*, 1 K. & J. 341.

(y) *Sayer v. Sayer*, 2 Vern. 688.

(z) *Acherly v. Vernon*, 10 Mod. 518.

(a) *In re Anderson*, (1928) W. N. 46.

(b) *In re Hurton, Lloyd v. Hatchett*, (1920) 2 Ch. 1.

(c) *In re Reeves*, (1928) W. N. 36.

(d) *Cole v. Seab*, 1 M. & G. 518.

(e) *Re Gibson*, 2 Eq. 669; *Sidney v. Sidney*, 17 Eq. 65.

(f) *Williams v. Dwen*, 9 L. J. (N. S.) 200.

(g) (1944) W. N. 66.

(h) *All Souls College v. Coddington*, 1 P. W. 597; *Wagstaff v. Wagstaff*, L. R. Eq. 229; *Mst. Rangod v. Harisa*, A. I. R. (1982) Nag. 163.

of land "of which [I am seized]" will not restrict a general devise to property belonging to the testator at the date of the will(*i*).

In some cases, even though no contrary intention appears on the face of the will, still from the inaptness of the description, after acquired property may be excluded, *e.g.*, where A devised "my cottage and all my land at S," and A subsequently contracted to purchase a large mansion house at S, the mansion was excluded(*j*).

A will may speak of or about any other date and may make stipulations as to time which may run from any date from which the testator meant that it should run, *e.g.*, a Hindu by his will directed that his wife should adopt a boy if any of the paternal uncle's sons might get a son and seven years time was allowed for this, it was held by their Lordships of the Privy Council that the seven years were to be computed from the date of the will and not the death of the testator(*k*).

Description of Donees.—This section has, as stated above, no application to the description of donees. Where a donee is designated by a description which may at different times apply to different individuals and the context does not point to any future time as the time at which the donee is to be ascertained then *prima facie* the only person who is entitled to take is the one who satisfies the description at the date of the will, if there was any person who to the knowledge of the testator then satisfied it, *e.g.*, if a testator make a bequest to his son John the bequest will take effect in favour of his son of that name at the date of the will and of him only(*l*). Similarly where there is a bequest to "my wife" the testator must be deemed to consider his wife at the date of the will. He cannot be supposed to refer to a future wife as marriage subsequent to will would revoke the will under sec. 69. Again if a bequest is made to the wife of B and B had a wife C living at the date of the will and C died in the lifetime of the testator and B married a second wife D, D is not entitled to the legacy(*m*).

But where the context shows that the donee is to be ascertained in the future but does not show at specific time, then the first person to satisfy the descriptions is presumed to be intended, *e.g.*, if a bequest is to "a son" or "a child" of A and if there is no son or child of A living at the date of the will, it will go to the first son or child of A who comes into existence before the death of the testator, (Halsbury, Vol. 34, p. 266).

Example

A testator devised his property to A for life and after his death the property was directed to be divided into four parts between one child of A, one child of B, one child of C, and one child of D. At the time of the making of the will and of the death of the testator B only had a child, namely, a daughter. But after the testator's death and at the death of A there were children, both sons and daughters of A, C, and D. Held, that the gift to one child was not void for uncertainty and that the eldest child of A, C and D, whether a son or daughter, were entitled to the property(*n*).

Where the bequest is made simply to a class of persons, then section 111 applies and it will go only to such as are alive at the testator's death.

Where a bequest is made to the wife of a third person, the rules are :—

(i) If the third person has a wife living at the *date of the will*, the bequest will be confined to her only and if she dies, the after taken wife will not be entitled to the legacy.

(i) *Jitendra v. Nitya*, 18 C. W. N. 140;

Doe d. York v. Walker, 12 M. & W. 591.

(j) *Re portal and Lamb*, 30 C. D. 50; *In re Knight*, 34 Ch. D. 518.

(k) *Jagannath Rao v. Rambharosa*, 38 Bom. L. R. 776 (F. C.).

(l) *Amyot v. Dwarries*, (1904) A. C. 288.

(m) *Boreham v. Bignall*, 8 Ha. 131; *Burrows Trusts*, 10 L. T. N. S. 184.

(n) *Powell v. Davies*, 1 Beav. 532; *Ashburner v. Wilson*, 17 Sim. 204.

(ii) If the third person has no wife living at the date of the will, *any* wife living at the death of the testator shall take the legacy.

(iii) If the third person has no wife living at the date of the will or at the death of the testator any woman with whom the third person shall first marry shall be entitled to the legacy. (Jarman on Wills, 6th Edn., p. 398). Under the Succession Act in the last case the bequest would be void. (See *ill. i.*, sec. 112).

Accordingly where a Hindu by his will bequeathed portions of his property to the wives of his unmarried sons and the sons, subsequent to the testator's death married persons who had been born when the testator was alive, it was held that the bequest was valid according to Hindu law(o).

91. Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

Power of appointment executed by general bequest.

[This is sec. 78 of the Succession Act X of 1865. It does not apply to Hindus, etc. See Schedule III.]

“**Unless a contrary Intention** appears by the will” these words occurred in the same section and full effect must be given to them. Where they do not occur there is no reason for applying the qualification.

This section is based on section 27 of the English Wills Act. Under the English Statute a general devise or bequest of realty or personalty operates, unless a contrary intention appears by the will, as an execution of any general power of appointment capable of being exercised by will. Under the English Statute the words are “any estate which he may have power to appoint in any manner he may think proper”, while the words used in this section are “any property which he may have power to appoint *by will* to any object he may think proper”. The effect of the section is to put the property over which the testator has a general power of appointment by will on the same footing as his own property. The section applies only to a general power.

Definition of “Power of Appointment”.—When a person is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property. (Sec. 69, Explanation).

Classification of Powers.—Under this Act two kinds of powers are mentioned, (1) a general power of appointment and (2) a special power of appointment.

General Power

A power is said to be general when property is bequeathed to A in trust for any person or persons and in such shares and proportions as A shall by any deed or will appoint, and in default of appointment to B. Here although A is not the beneficial owner of the property, yet he has the power at any time to dispose of

the property as he likes and he may appoint the property to himself(p). Such a power of appointment is of great value and is nearly as good as ownership of the property, and the donee takes the property absolutely. Similarly if the donee is given a life interest coupled with a general power of appointment by deed or will, the donee may by executing a deed in his favour convert the life interest into an absolute interest. In *Bapuji R. Kerawalla v. Haji Esmail(q)* a testator bequeathed his house to his nephew for life and directed that the nephew should take the net income but "he cannot sell or mortgage the said house and after the decease of my nephew the house shall be received by such persons and in such manner as my said nephew by his will or by any deed or writing whatever appoint and if he should not leave his will or deed or writing I give the house in gift after his decease to his children in equal shares". The nephew contracted to sell the house. On a question on title on originating summons it was held that in spite of the restrictions in the will the nephew took the house absolutely, and he could convey direct to the purchasers or he can first appoint to himself and then convey. A bequest to a female (whether sole or covert) for life and after her decease to such person as she shall appoint and in default of appointment to her executors, administrators and assigns is equivalent to an absolute gift, (Farwell on Powers, p. 14). In *Shrinbai v. Ratanbai(r)* a Parsi by his will gave life interest to his wife and directed as follows:—"In her lifetime keeping God and Meher Davar (Dispenser of Justice) before her mind my wife shall duly, as I have directed her orally, make her will, etc." It was held that the clause gave to the wife a valid general power of appointment. A power of appointment is also to be deemed general, although it may be exercisable with the consent of the trustees(s).

A power of appointment implies three persons:—(1) The creator or donor of the power; (2) the donee or appointer of the power, *i.e.*, the person to whom the power is given and (3) the appointee, *i.e.*, the person in whose favour the power is to be exercised.

What is Sufficient Execution of General Power :

Sec. 91 is confined to the execution of general powers and it states that a general bequest of the property of the testator shall be deemed to include the property over which the testator has a general power of appointment and shall operate as an execution of the power unless there is a contrary intention. In other words, if the testator has a general power of appointment over a certain property, either by deed or by will, and he fails to execute the power, but dies leaving a will containing a general residuary clause or a clause bequeathing all his estate and effects to a particular person, the property over which the testator had the power of appointment will pass under such a bequest or under the residuary clause as the case may be(t). A direction to the executors to pay the testator's debts out of his estate operates as an execution of a general power in favour of executors(u). Before the passing of the Wills Act of 1837 in England a general devise of the property by a testator was no execution of his power of appointment, but operated only on the property that was the testator's own. In order to effectually execute the power of appointment the testator was required to refer to the property over which he had the power of appointment. Sec. 27 of the Wills Act in England provided a remedy for that. It is also immaterial whether the will containing a general bequest is of a date prior or subsequent to the instru-

(p) *Irwin v. Farrer*, 19 Ves. 86.

(q) 46 Bom. 694; *London Chartered Bank v. Lampriere*, L. R. 4 P. C. 572 (this case was followed in *Gregory v. Samuel*, 21 C. W. N. 992).

(r) 45 Bom. 711 (P. C.); 48 I. A. 69.

(s) *In re Phillips, Lawrence v. Huxtable*, (1931) 1 Ch. 347.

(t) *Spooner's Trust*, 2 Sim. (N. S.) 129; *Attorney-General v. Brackenbury*, 1 H. & C. 782.

(u) *Wilday v. Barnett*, 6 Fq. 13.

ment creating the power(v). Thus in *Dinshaw v. Dinshaw*(v) N. J. Wadia made his will in 1885 appointing his wife to be executrix and gave his residuary estate, in the event of his dying without issue to certain charities. In 1888 the testator executed a deed of settlement of his Ambolee properties. That deed contained a power of appointment to himself providing that the trustees shall hold the said property in trust for such person or persons or charity or charities as the said N. J. Wadia should by deed or will appoint. It was held that the testator had exercised the power of appointment reserved to himself under the settlement of 1888 by the will of 1885. The power of appointment may have been given by deed or will but the essential condition under this section is that it must be capable of being exercised by will.

A general power differs from a special power or a trust power in the following respects :—In the case of a general power there is no trust reposed and if the power is not exercised sec. 91 will come into operation ; but in a trust power if the power is not exercised equity in order to carry out the trust will interfere and distribute the property amongst all the objects of the power in equal shares and the class will take *per capita* as tenants in common(w). There is also another distinction between a general power and a special power and it is this—that in case of a general power the assets will be available to the creditors of the testator in preference to the volunteer in whose favour the power is exercised(x). In the case of a general power if there is a gift over in default of execution of a general power the gift over will take effect if the power is not exercised but in case of a special power the gift over is always implied whether it is expressly mentioned or not. Even if the power to appoint is invalid the gift over in default will be given effect to so as not to disappoint the appointees(y). No such implication will arise in case of mere power(z).

Contrary Intention.—The contrary intention sufficient to counteract the provision of this section must be clearly expressed or implied by the will. Contrary intention is not to be presumed by the mere fact that the power of appointment is contained in a document executed before or after the date of the will(a). An ineffectual attempt to appoint is also not evidence of a contrary intention(b).

Hindu Law and Power of Appointment.—As the power of appointment is purely a creature of English law, this section is not applied to Hindus. But the Hindu law also recognises such powers with certain limitations. These limitations are :—(1) that the appointee should be a person who was alive at the death of the testator(c), and (2) that the appointee must be ascertained when the event arises on which he is to take(d).

92. Where property is bequeathed to or for the benefit of

Implied gift to
objects of power in
default of appoint-
ment.

certain objects as a specified person may appoint,
or for the benefit of certain objects in such propor-
tions as a specified person may appoint, and the
will does not provide for the event of no appoint-
ment being made ; if the power given by the will is not exercised,
the property belongs to all the objects of the power in equal shares.

(v) *Bayes v. Cook*, 14 C. D. 53; *Dinshaw v. Dinshaw*, 31 Bom. 473, (same as *Sorabji v. Sorabji*, 9 Bom. L. R. 488).

(w) *Wilson v. Douglas*, 24 Ch. D. 244.

(x) *In re Phillips, Lawrence v. Huatable*, (1931) 1 Ch. 347.

(y) *Byramji v. Ratnagar*, 18 Bom. 1.

(z) *Re Weeke's Settlement*, (1897) 1 Ch. 289.

(a) *Dinshaw v. Dinshaw*, 31 Bom. 472.

(b) *Re Spooner's Trust*, (1851) 2 Sim. (N. S.)

129.

(c) *Tagore v. Tagore*, 9 B. L. R. 377.

(d) *Javerbai v. Kahlilbai*, 16 Bom. 492; *Motivahu v. Mamubai*, 21 Bom. 709, 24 I. A. 93; *Manorama v. Keli Charan*, 31 Cal. 166; *Bhagabati v. Keli Charan*, 38 Cal. 468 (P. C.); *Mahim Chandra v. Hara Kumari*, 42 Cal. 561; *Adv.-General v. Vithaldas*, 22 Bom. L. R. 1005.

Illustration

A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

[This is sec. 79 of the *Succession Act X of 1865*. The words "shall appoint" is changed into "may appoint". It does not apply to *Hindus*, etc.]

Special Power

This section deals with special or limited powers of appointment. These are powers in the nature of trusts. As stated in the illustration there is a trust created by the donor of the power of appointment but instead of the donor himself indicating the objects of the trust he empowers the donee of the power to make the selection, out of the objects specified by him; if the donee does not exercise that right of selection, then instead of disappointing the objects, this section provides that the property will go to all the objects of the power in equal shares.

The conditions laid down before this section can be applied are :—(1) Objects for whose benefit the power is created must be indicated; (2) there must be no provision in the instrument creating the power that in default of appointment the property should be distributed in a particular manner and (3) the power must be given by a will and not by a deed.

To exercise a special power there must be either, (1) a reference to the power or (2) a reference to the property subject to the power or (3) an intention otherwise expressed in the will to exercise the power, (Halsbury, Vol. 34, p. 153). If either of these references is absent in the will, then the power shall be deemed not to have been exercised and if there is no provision for default of appointment, then the property will go to all the objects of the power in equal shares.

In the case of a special power if the power is exercised the Court will not interfere and control the discretion or prescribe a mode of exercising it. The Court will only interfere if the power is not exercised. Until the donee of the power exercises the same, the rule is that the property vests in all the members of the class and they will take in default of appointment, *e.g.*, if a property is given to the children of A as B shall appoint, the property vests in all the children of A at the death of the testator and those children alone of A only will take in default of appointment to the exclusion of any after born child of A. But if a life interest intervenes the children born during the life of the life-tenant will be included.

Examples

(1) A certain property was settled on A and B for their joint lives, and on the death of the survivor, among all and every the children of A, in such shares as A might by will appoint. A had seven children at the date of the settlement, one of whom died before A who died without executing the power of appointment. It was held that the property should be divided into seven shares, one of which was to go to the representatives of the deceased child(e).

NOTE.—In the case of a special power, if the instrument gives the property to a class but gives power to A to appoint in what shares and in what manner he likes, the property vests until the power is exercised in *all* the members of the class and they will take in default of appointment including any member of the class who shall have predeceased the donee of the power. But a direct gift without the intervention of a life interest to the children as A may appoint goes apparently to all the children living at the death of the testator to the exclusion of those born afterward, though before the death of A(f).

(2) A property is settled on A for life with remainder to the children of A as he shall appoint. At the date of the settlement A had three children. At the date of his death he

(e) *Lambert v. Thwaites*, L. R. 2 Eq. 155.

(f) *Coleman v. Seymour*, 1 Ves. Sen. 209.

had five children. A failed to exercise the power. The property shall be divided amongst the five children of A in equal shares(g).

(3) A testator disposed of his property as follows :—“To my son A two shares—only interest. To my daughter B and C one share each—only interest. Shares shall not be transferable during their lifetime. At the demise of my children without issue shares to be divided in the above proportions to the survivors. In the event of issue they to have power to bequeath their share to any one of their children they may select.” C married and by marriage settlement her share was settled on certain trusts. C and her husband subsequently made a joint will constituting the survivor sole heir. C died leaving one child. C's husband and trustees filed a suit for construction. *Held*: that the settlement was void, that the power of appointment given to C was not exercised properly by joint will and that the child of C was entitled to her share(h).

93. Where a bequest is made to the “heirs” or “right heirs” or “relations” or “nearest relations” or “family” or “kindred” or “nearest of kin” or “next-of-kin” of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations

(i) A leaves his property “to my own nearest relations.” The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(ii) A bequeaths 10,000 rupees “to B for his life, and, after the death of B to my own right heirs.” The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(iii) A leaves his property to B; but if B dies before him, to B's next-of-kin; B dies before A; the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(iv) A leaves 10,000 rupees “to B for his life, and after his decease to the heirs of C.” The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

[This is sec. 80 of the Succession Act X of 1865. This section does not apply to Hindus etc.]

This section is to be read with section 97. The distinction between this section and section 97 is that under section 97 the words “A and his heirs” etc., are words of limitation and do not denote direct objects of the gift (see *ill. (i)* to sec. 97), whereas under sec. 98 the words “heirs” or “next-of-kin” are words of purchase and denote a direct and independent bequest. In order to invoke the operation of section 98 the conditions laid down in the section must be complied with, *viz.* :—(1) The class designated forms the direct and independent object of the bequest; *e.g.*, in illustration (i); (2) there must be no qualifying terms in the will in relations to the bequest(i), the expression “without any qualifying terms” was construed to refer to “bequest” and not to “heirs” etc., in this case, but with respect it is submitted that is not the correct view, the natural reference is to “heirs” etc., and (3) the “next-of-kin” etc., must be of a particular person and that particular person may be the testator himself as in *ill. (ii)*.

(g) *Crone v. Odell*, 1 Ball and Bea. 449.

(h) *Fehrsen v. Simpson*, 4 Cal. 514.

(i) *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207.

When is the Class to be ascertained.—Subject to any contrary intention declared in the will the class of heirs, etc., must be ascertained at the date of the testator's death(*j*). The words of the will may indicate the point of time at which the class is to be ascertained. The expression used in this sec. is "without any qualifying terms". The contrary intention may be gathered from the context of the will. Thus a gift to children "now living" will include only those in existence at the date of the will and all children born after the date of the will will be excluded(*k*). The language of the will may indicate the period of distribution when the class is to be ascertained, (see *ill. ii*).

"Leaving Assets for the Payment of his Debts independently of such Property".—Under section 323 the executor or administrator of a deceased person is required to pay all the debts left by the deceased before the payment of any legacy. If a man dies leaving a will bequeathing property X to "his heirs" and has also left other property, then that other property so far as it will extend will first be applied in the payment of his debts and the "heirs" will take the property X, without any liability to pay the debts of the deceased. But if a person dies intestate leaving heirs, his property will be first applied by his administrator in the payment of his debts and the surplus will go to his heirs. That is the distinction laid down by the expression "leaving assets for the payment of his debts independently of such property."

Shelly's Case.—One of the rules in this case is that if an estate is vested in trustees in trust for A for life with remainder in trust for the heirs of A, then A takes an estate in tail. This section is a departure from this rule. Here, if a property is given to A for life with remainder to the heirs of A, the property will after A's death belong to the next-of-kin of A, in accordance with the rules of intestate succession (see *ill. iv*). The rule in *Shelly's case* was not applied to Parsis(*l*). It was also not applied to Portuguese(*m*).

"Heir".—This word is defined in the Indian Trustee Act XXVII of 1866 as follows:—In the case of a will made or an intestacy occurring before the first day of January, 1866, "heir" shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property; and "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent.

In the case of a will made or an intestacy occurring on or after the first day of January, 1866, "heir" shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate; and "devisee" shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession.

An heir comes into existence only on the death of the ancestor. No one can be the heir of a living person(*n*). Therefore when a bequest is made to the heirs of a person those persons who would be entitled to inherit the property of that

(*j*) *Dinbai v. Nusserwanji*, 49 I. A. 323 at p. 328. See also *In re Sutton, Elans v. Oliver*, (1934) 1 Ch. 209.

(*k*) *James v. Richardson*, (1877) 1 Eq. Cas. 214.

(*l*) *Mithibai v. Limji N. Banaji*, 5 Bom. 306, (in appeal) 6 Bom. 151.

(*m*) *Antao v. Ardeshir*, 1 Bom. L. R. 303.

(*n*) *Gurudas v. Bhupendra Nath*, A. I. R. (1939) C. 206.

person on his death intestate, *i.e.*, his next-of-kin are meant. In a gift to the "heirs of A" the heirs take in the proportion laid down in Part V, Chapter II in case of Europeans etc. and in Chapter III for Parsis in case of intestacy. A bequest to the "heirs of my brothers and sisters was held to be a gift to the sisters and the daughter of the deceased brother(o).

The word "heir" would include all the next-of-kin of the deceased unless any is expressly excluded. In *Dinbai v. Nusserwanji(p)*, a Parsi by his will provided that after the death of his widow his property be held in trust for his son J for life and on J's death to his widow and children. If J died without issue Rs. 10,000 to be paid to J's widow and to divide the residue "among my heirs" according to the law of intestate succession among Parsis excluding the widow of J from getting any share in such distribution. J died without issue leaving widow who claimed the residue. It was held that she was excluded.

"Relations" and "Next-of-kin"

Relations.—When a legacy is given by a testator to "my relations" or "to my nearest relations," or "my most necessitous or poorest relations" the legacy will be distributed amongst the persons who would be entitled under the order of succession, if the person bequeathing the legacy had died intestate and would include a wife(q). (See *ill. i*, see also Halsbury, Vol. 34, p. 321). The word "next-of-kin" must also be construed in the same sense. In England a distinction is taken between those who are related *by blood* and those who are related *by marriage*, and, if a bequest is made to the relations, *simpliciter*, the bequest is to the nearest in blood to the *propositus* and will exclude the husband or wife(r). It is not so under this section. In a bequest to "relations," the relations by blood or by marriage will take unless there is anything contrary in the will.

As there is no distinction under the Act between those who are related by half blood and those related by full blood under the expressions "relations," or "next-of-kin", etc., persons related by half blood shall be entitled to succeed equally with those related by full blood.

A bequest to "Friend and Relations" means a bequest to relations, the word "friend" being taken as synonymous with "relations"(s). A gift to "deserving poor relations" will receive the same construction as a gift to relations(t). Perpetual trusts for benefit of "poor relations or descendants" are, however, charitable(u). But bequest of this kind must not be confined to the heirs or next-of-kin of the testator. In *Atlia v. Madha(v)* it was held that a trust the income of which was to be applied in perpetuity for the benefit of the "poor relations or poor descendants" of the testator was charitable. But on the other hand a trust to benefit only the poor members of the settlor's family is not a charitable trust(w).

Where power is given to a person to distribute a fund "among my relations, in such manner as he shall think proper", the appointment cannot be in favour of any relative who is not within order of succession(x). But when the power is to distribute the fund amongst such of my relations as A shall in his discretion select, A is not confined to the relations within the order of succession(y). (See Williams on Executors, 12th Edn., pp. 720-721.)

(o) *In re Dale*, (1931) 1 Ch. 357; *In re Cossentine*, (1933) 1 Ch. 119.

(p) 49 I. A. 323.

(q) *Withorn v. Harris*, 2 Ves. Sen. 527.

(r) *Halton v. Foster*, L. R. 3 Ch. App. 505; *Cholmondeley v. Lord Ashburton*, 6 Beav. 86.

(s) *Gower v. Mainwaring*, 2 Ves. Sen. 86.

(t) *Wedmore v. Woodrooffe*, Amb. 636.

(u) *White v. White*, (1802) 7 Ves. 423.

(v) 14 Rang. 573.

(w) *Taw Chew v. Taw Kock*, (1939) Rang. 520; A. I. R. (1939) R. 203.

(x) *Re Deakin, Starkey v. Eyres*, (1899) 3 Ch. 565.

(y) *Finch v. Hollingwork*, 21 Beav. 112.

Family.—"Family" is not a technical word and is of flexible meaning. The primary legal meaning of the word "family" is children. But the word "family" is also construed according to English law in various senses, such as kindred, or relations, or in its primary meaning as children only to the exclusion even of the wife(z). It may mean a man's wife, children and servants or his wife and children, (Halsbury, Vol. 28, p. 747, Hailsham Edn., Vol 34, p. 306). According to sec. 93, however, a bequest to family *simpliciter* is a bequest to all the persons who would be entitled in case of intestacy. In *Khetter Mohan v. Gunga Narain(a)*, the word "family" was held to mean the testator's descendants and their wives living at the time of his death(b). The word "family" may be controlled by the context and may include the wife(c) or "descendants" generally(d). Sometimes the word "family" is held void for uncertainty. *e.g.*, a bequest to "my daughters, their husbands and families"(e). A gift to the families of A and B was construed as a gift to all the children of A and B *per capita*, in joint tenancy(f).

Next-of-kin.—Where there is a gift to the testator's next-of-kin without more, all those who are kindred of the testator at the date of his death will take as if that person had died intestate; and when there is a gift to the next-of-kin of any other person and if that other person dies before the testator the property will go to the next-of-kin of such person at the testator's death. (See *ill. iii*). If that person survives the testator, the class is to be ascertained at that person's death. (Halsbury, Vol. 28, p. 756).

Brothers-in-Law, Sisters-in-Law:—Where a bequest is made "to be divided between my sister-in-law and my brothers-in-law", it was held that the persons entitled to the bequest were (i) the spouse of a brother or sister of the testatrix or (ii) the brother or sister of the husband of the testatrix(g).

94. Where a bequest is made to the "representatives" or "legal representatives" or "personal representatives" or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Illustration

A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of A's debts as may remain unpaid: if there be any surplus B will pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

[This is sec. 81 of the Succession Act X of 1865. It does not apply to Hindus, etc.]

In a bequest made to the "representatives" of any person whether simply or with the added qualification of "legal" or "personal" and the class so denoted forms the object of the bequest as a direct and independent object, *i.e.*, the word is not a word of limitation as in sec. 97 (see *ill. i*) a bequest to "A and his representatives," but is a word of purchase as in illustration to this section, a bequest to the "legal representatives of A," then and in such case the property bequeathed is to be distributed as if it belonged to A and he had died intestate in respect thereof.

(z) *Re Hutchinson and Tenant*, 8 Ch. D. 540.

(a) 4 C. W. N. 671.

(b) *Gnanendra v. Surendra*, 24 C. W. N. (1026) (P. C.); see also *Doe d' M'Kenzie v. Pestonji, Perry*, O. C. 581.

(c) *Blackwell v. Bull*, 5 L. J. Ch. 251.

(d) *Williams v. Williams*, 20 L. J. Ch. 280.

(e) *Robinson v. Waddelow*, 8 Sim. 134.

(f) *Gregory v. Smith*, 9 Hare. 708.

(g) *In re Richards*, (1939) W. N. 408.

Similarly if a bequest is to "A, his executors and administrators," the expression "executors and administrators" are words of limitation, (see sec. 97, *ill. i*). But if the bequest is to the "executors" or "administrators of A" as in illustration to this section, then the expression "executors or administrators" is a word of purchase.

The difference between section 93 and section 94 is that under section 93 the person takes the bequest *beneficially*, whereas in the case of a bequest to representatives, executors, etc., of a particular person *simpliciter* under sec. 94, the representatives, etc., do not take it beneficially but hold it *as part of the estate which they represent* and for the purposes, whatever they may be, for which they hold the general estate of the person whose representatives they are (*h*).

The words "representatives" or "legal representatives" are sometimes construed as next-of-kin and in that case they will take the estate beneficially for themselves. The context may show that by representatives are meant next-of-kin, *e.g.*, where the gift is to them "equally," or "share and share alike" (*i*).

95. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

Bequest without words of limitation.

[This is sec. 82 of the Succession Act X of 1865. It applies to Hindus etc.]

In England before the Wills Act a devise of real estate without any words of limitation was held to pass an estate for life only and in order that a devise in fee should pass, the technical words "heirs and assigns" were required to be added. This worked a great hardship and section 28 of the English Wills Act remedied this hardship. That section provides that, "where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will", (1 Vict. C. 26, sec. 28). Sec. 95 is enacted on the same principle and no technical words are required to be added in order to transfer the whole interest of the testator. As to whether a particular clause or a particular expression conveys the whole interest or a limited interest is in each case a question of construction; but an unqualified gift will not be cut down by subsequent words (*j*). This section only enacts that technical words are not necessary, and hence a gift whether of moveable or of immoveable property without express words of inheritance or without express power of alienation will carry an estate of inheritance in the absence of any contrary intention (*k*). Where property is bequeathed to a person *simpliciter* he is entitled to the whole interest, unless it appears from the will that a limited interest was intended (*l*). In the under mentioned Privy Council case the expression "I leave my house in charge of my wife" was held equivalent to "I devise my house absolutely to A." (*m*).

Gift to Hindu Widows.—In construing wills of Hindus whether governed by the Hindu Wills Act or otherwise under this head the general rules laid down in the Privy Council decisions stated in the beginning of this chapter must be borne in mind. A Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family and also that as a general rule women do not take absolute interest of inheritance which they are enabled to alienate, *e.g.*, a mere

- (h) *Mackenzie v. Mackenzie*, 3 Mac. and G. 599; *Long v. Watkinson*, 17 Beav. 471; *Lord Advocate v. Bogle*, (1894) A. C. 83.
- (i) *King v. Cleveland*, 4 De. G. & J. 477; *Re Grylls' Trusts*, L. R. 6 Eq. 589.
- (j) *Tripurari v. Jagat Tarini*, 40 I. A. 37.

- (k) *Lala Ramjewan v. Dal Korr*, 24 Cal. 406; *Caralapathi v. Cola*, 33 Mad. 91.
- (l) *Raghunath v. Deputy Commissioner of Partabgarh*, 32 Bom. L. R. 129 (P. C.).
- (m) *Abiba Ali v. Alhaji Mama Ali*, A. I. R. (1942) P. C. 69.

gift of immoveable property by a Hindu to his wife does not carry with it the power of alienation (*n*). In *Ramchandra v. Vijayaragavulu* (*o*) it was, however, held that an absolute gift of immoveable property to a widow for maintenance was not unknown to Hindu law (*p*). If the husband wishes that an absolute power of alienation should be given to his wife he must give it in express terms (*q*). Whether this rule of Hindu law is modified by sec. 95 which applies to Hindus formerly governed by the Hindu Wills Act, see *Pulliah Chetti v. Varadarajulu* (*r*), where it was held that a gift of immoveable property *simpliciter* to his wife will convey absolute interest. However, in the case of *Caralapathi v. Cota* (*s*) it was held that the operation of the ordinary rule of Hindu law that a bequest to a wife without words creating an absolute estate conferred only a limited interest was excluded by sec. 95. But in *Bai Suraj v. Jijibhai* (*t*) the view that under the Hindu law in the case of immoveable property given to or devised by a husband to his wife the wife has no power of alienation was held to be not sound. If the words of the will confer an absolute ownership, the wife will take it absolutely. This proposition that in the case of a bequest of immoveable property by husband to his wife, the wife has no power of alienation is not sound is confirmed by the Privy Council (*u*). See also *Bhoba Tarini v. Peary Lall* (*v*), also *Hirabai v. Lakshmi Bai* (*w*) where it was held that a widow taking under her husband's will takes only a widow's estate unless the will contains express words giving her a larger estate (*x*). In *Anbalal v. Bai Rewa* (*y*) it was held that in order to create an absolute interest in favour of his wife it would be necessary for the husband to use express language to that effect (*z*). The words "permanent owner like myself" would confer an absolute interest. In *Mulchand v. Rukshmani* (*a*) a testator bequeathed his property to his wife in the following words, "After my death my wife is to take my property into her possession with authority to consume, enjoy or do what she likes... After the death of my wife my son is the owner of my estate"; it was held that the widow did not take an absolute estate. On the other hand in *Bhupate v. Chandi Charan* (*b*) a bequest by the testator to his wife of all his moveable and immoveable property with power to her to make gift and sale and "that whatever properties shall be left after her death shall vest in my sister's son who will be sole heir to the said property" was held to confer absolute interest to the widow and the gift over was invalid. If, on the other hand, a husband while making a disposition in favour of his wife uses words conferring absolute ownership she would enjoy all the rights of an owner including the power of alienation (*c*).

Again, when a Hindu testator by his will gives an authority to his wife to adopt a son to him, it does not necessarily follow that the widow takes a life estate, if there is nothing in the will to that effect (*d*). In other words, if the words of the will are clear an absolute bequest should not be cut down to a mere life interest, merely because the bequest is to a woman (*e*).

(*n*) *Harilal v. Bai Rewa*, 21 Bom. 376.

(*o*) 31 Mad. 349.

(*p*) *Saroda v. Kristo*, 5 C. W. N. 300; *Mahomed v. Shewukram*, 2 I. A. 7; *F. Yorke Smith v. Tribhorandas*, 19 Bom. 401; *Motivahoo v. Mamubai*, 24 I. A. 93; *Mahim Chandra v. Hara Kumari*, 42 Cal. 561; *Basantkumar v. Ramshankar*, 59 Cal. 859.

(*q*) *Seshayya v. Narasamma*, 22 Mad. 357.

(*r*) 31 Mad. 474.

(*s*) 33 Mad. 91.

(*t*) A. I. R. (1925) B. 38.

(*u*) *Saligram v. Charanjit*, 57 I. A. 282; 32 Bom. L. R. 1578.

(*v*) 24 Cal. 646.

(*w*) 11 Bom. 573.

(*x*) *Damodardas v. Dayabhai*, 22 Bom. 833; *Abdul Kurim v. Abdul Qoyum*, 28 All. 342.

(*y*) 5 Bom. L. R. 344.

(*z*) See also *Kconjebehari v. Premchand*, 5 Cal. 684.

(*a*) 25 Bom. L. R. 189.

(*b*) 39 C. W. N. 390.

(*c*) *Bhaidas v. Bai Gulab*, 46 Bom. 153 (P. C.); see also *Ramachandra v. Ramchandra*, 42 Mad. 283.

(*d*) *Toolsi Dass v. Madan Gopal*, 28 Cal. 409.

(*e*) *Atul Krishna v. Sanyasi*, 32 Cal. 1051; *Hoorbai v. Sooleman*, 3 Bom. L. R. 790.

It is extremely difficult to lay down any rule for determining whether a life interest or an absolute interest is intended. But in the absence of anything to the contrary, in the case of a bequest to a Hindu widow the prohibition against alienation or a gift in remainder may indicate that a limited interest was intended(f). On the other hand the Calcutta High Court has gone to the extreme length of holding that if an estate is given simply without words of inheritance it would, in the absence of anything to the contrary in the will, carry by Hindu law an estate of inheritance and it is immaterial whether the legatee is a male or female (g). In the latest Privy Council case of *Shalig Ram v. Charanjit(h)* it is laid down that there is no rule of Hindu law that in case immoveable property devised by a husband to his wife the wife has no power to alienate unless the power of alienation is conferred upon her in express terms. If words are used conferring absolute ownership upon the wife she enjoys the rights of ownership without the same being conferred by express and additional terms unless the circumstances or the context are sufficient to show that such absolute ownership was not intended. The conclusion to be drawn is that there are two alternative constructions in the case of property devised by a Hindu husband to his wife, viz., that the property in the hands of his wife is either her Stridhan in every sense or she has nothing more than a Hindu widow's estate in respect of it(i).

As to the construction of the word "Malik" used in connection with gift to Hindu widows see pp. 134-135 *ante* and see also *Radha Prasad v. Ranee Mani(j)*.

Life interest to Hindu Widow with Power of Alienation:—When a bequest is made to a Hindu widow the ordinary rule of construction is that she takes a widow's estate which under Hindu law gives her an authority to alienate the property bequeathed in case of legal necessity(k). There is another class of cases where the bequest is made to a Hindu widow coupled with the obligation to maintain, educate and bring up the children of the testator. If the children attain majority and are otherwise provided for, the obligation ceases, the widow takes only a life interest(l).

There is, however, a third class of cases where the property is bequeathed to a Hindu widow and the will confers on her a power to alienate with a proviso that on her death the property should go to X. Such a will was construed in *Mafatlal v. Kanialal(m)*. The will was in the following words, "If I die then my son's wife G is the owner of the properties. The said G shall during her lifetime spend and use and enjoy out of my property and as to whatever may remain over after her decease her two daughters are the owners thereof." It was held that G took the property for life with a power of disposal in her lifetime and the daughter who survived her took absolutely. This case has been referred to in *Gulbaji & Co. v. Rustomji(n)*. *Mahim Chandra v. Hara Kumari(o)* was another case of this type. The testator gave his property to his wife in the following words "You are my legally married wife and entitled to the property left by me. You will have the right and power to alienate by gift or sale all the aforesaid properties. My daughter H shall become entitled to and possessor of whatever properties will remain after your death and shall enjoy the same. The said daughter shall have the same rights in the aforesaid properties as you have." It was held that the widow took an estate for life with power of alienation and to the extent to which such power was

(f) *Siva Rau v. Villa*, 21 Mad. 425; *Gosavi Shingor v. Rivett-Carnac*, 13 Bom. 463.

(g) *Bipradas v. Sadhan Chandra*, 56 Cal. 790; *Basanta Kumar v. Ramshanker*, 59 Cal. 359.

(h) 32 Bom. L. R. 1578 (P. C.); 57 I. A. 282.

(i) *Ramu v. Kashi*, (1944) All. 9.

(j) 35 Cal. 396 (P. C.) (reversing 33 Cal. 947).

(k) *Mulchand v. Rukshmani*, 25 Bom. L. R. 189; *Jamina Das Ramanter*, 27 All. 364.

(l) *Natha Kerra v. Dhunbaiji*, 23 Bom. 1.

(m) 17 Bom. L. R. 705.

(n) 49 Bom. 478 at p. 484.

(o) 12 C. W. N. 412 (in appeal) *Mahim Chandra v. Hara Kumari*, 42 Cal. 561.

not exercised the daughter took the property. In *Mulchand v. Rukshmani* (p) the question raised was whether a Hindu widow who was given such a power could be restrained if she wrongfully exercised such a power and wasted the estate. The Court granted injunction restraining her from wasting the estate. It is submitted with respect that in view of the latest decision of the Privy Council noted below it is not a correct decision. *Matru Mal v. Mehri Kunwar* (q) was another case where a Hindu bequeathed his property to his wife with the right to spend transfer or mortgage the same and after her death his daughter M was to be the owner of the property that might remain at the death of the wife. It was held that the widow having become the full owner under the will of her husband, the gift in favour of the daughter was void and that on the death of the widow her daughter inherited the property from her mother as her Stridhan heir, i.e., a limited owner and that on the death of the daughter her heir was her daughter and not her son. In *Jagat Singh v. Sangat Singh* (r) a Hindu testator bequeathed to his widow certain property as exclusive owner with all kinds of power to deal with that property. After her death whatever property that could remain was bequeathed to the sons of the testator. It was held that the widow took absolutely and the restraint against alienation was void.

In the latest Privy Council decision on this subject (s) there was a document which was treated as a will whereby P the grantor gifted certain properties to his two daughters Ram Piari and Indiramati and to Gouri Shanker widow of his deceased daughter Man Kuwar in equivalent shares and reserved to himself a certain share in Mauze Deomai. As regards this share the document provided "As regards 4 anna Zamindari share in Mauze Deomai which is in my possession and which under this document has not been transferred I shall have power of transfer and after my death my wife Musamat Ghambhiri Kunwar shall have power of transfer in respect of the remaining property of all kinds..... . . . If I, the executant, or my wife die without making (any) arrangement or transfer, then my property shall, according to Shastra, devolve on my daughters who are alive or on their descendants entitled to it" After the death of P his widow Ghambhiri made a gift of the property in favour of her daughter Ram Piari. Ram Piari made a deed of gift in favour of her husband Shiamlal. The suit was filed to set aside all alienations made by Ghambhiri on the ground that she had no power to alienate. It was contended that if a bequest was made to a Hindu widow with the power of alienation, such a power was merely the power of transfer which a Hindu widow has over her deceased husband's property in case of legal necessity. But that contention was not accepted. It was held that there was nothing repugnant to any principle of Hindu law for a Hindu by his will, while not giving his widow any absolute estate in his property to confer on her as full a power of transfer over the property she inherits as his widow as he himself had. She thereby acquires a full power of transfer in excess of the ordinary powers of transfer for legal necessity and in exercise of that full power she has authority to make out and out alienation of the property binding on her husband's reversioners even after her death. Their Lordships also pointed out the difference between an absolute bequest to a Hindu widow and a bequest coupled with the power of alienation, viz., that in the case of an absolute estate it would devolve on her heirs whereas in case of a husband's estate with full power of transfer the property remaining untransferred would devolve on the next heir of the husband.

Gift to other Female Heirs.—In respect of other female heirs, e.g., daughters etc., the rule is not so strict and in *Jogeswar v. Ram Chund* (t) a gift to a daughter of four annas share "for your maintenance" was held to be an absolute gift, and

(p) 25 Bom. L. R. 189.

(q) (1940) All. 416.

(r) A. I. R. (1940) P. C. 70.

(s) *Bishun Singh v. Sri Thakurji Mangla*, 72 I. A. 27; A. I. R. (1945) P. C. 30.

(t) 23 I. A. 37.

in *Kamarazu v. Venkataratnam* (u) a bequest to the two daughters, to be enjoyed by them "as they pleased" was held to confer absolute interest (v).

Even where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended, effect will be given to that intention by cutting down the effect of the former words and construing them as conferring a life estate only (w). But if the gift is unqualified, it will not be cut down by subsequent words unless the words have that effect (x).

The Hindu Women's Rights to Property Act XVIII of 1937 has altered the law. But section 3, sub-section (4) of that Act provides that section 3 of that Act shall not apply to any property to which the Indian Succession Act, 1925 applies.

96. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustrations

- (i) A bequest is made to A or to B. A survives the testator. B takes nothing.
- (ii) A bequest is made to A or to B. A dies after the date of the will, and before the testator. The legacy goes to B.
- (iii) A bequest is made to A or to B. A is dead at the date of the will. The legacy goes to B.
- (iv) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.
- (v) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect.
- (vi) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.
- (vii) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

[This is sec. 83 of the Succession Act X of 1865. It applies to Hindus, etc.]

Alternative Donees.—This section deals with the case of alternative donees. Its object is to prevent lapse. This section requires that the original bequest should be to an undivided (the word used in the sec., is person), the alternative bequest may be to a person or to a class. The section follows to some extent the rule as to personal property prevailing in England. In case of realty, if the gift is to several persons in the alternative, it was regarded as void for uncertainty (y). Two or more gifts may be made to take effect alternatively. The simplest form of an alternative gift is introduced by the word "or," e.g., a bequest to A or to B. In such cases a contingency is implied if not expressed. In such a case the rule is that if a contrary intention is not expressed in the will, the first legatee, viz., A, will take the legacy if he is alive when the testator dies, but if he be then dead the legacy will go to B. The substituted gift takes effect if the original legatee dies before the testator or even if he be dead at the date of the will, see

(u) 20 Mad. 293.

(v) *Sita Rau v. Vitha*, 21 Mad. 425.

(w) *Vulubhdas v. Thucker Gordhandas*, 14 Bom. 361; *Somasundara v. Ganga*, 28 Mad. 386.

(x) *Damoderdas Tapidas v. Dayabhai Tapidas*, 25 I. A. 126, 22 Bom. 833; *Tripurari v. Jagat Tarini*, 40 I. A. 37; *Gulbaji v. Rustomji*, 27 Bom. L. R. 380; 49 Bom. 478.

(y) *Langmore v. Broom*, 7 Ves. 124.

illustrations (ii) & (iii). Thus a direct gift to "A or his children" or "to A or his issue" goes to A if he survives the testator, and to his children or issue if he does not. Similarly, if there is a life interest and then a gift "to A or his children" the substitutional gift takes effect whether A dies in the lifetime of the testator or the tenant for life. (*Ill. vi.*, and *vii.*) But a gift to A or B, or to A or his children, as C may appoint is not substitutional, and in default of appointment it goes among all the appointees equally(*z*).

The contingency referred to above is the death of the first named donee before some particular period, *e.g.*, the death of the testator or some other period of distribution. The first donee takes if he is then alive; the second donee takes if the first donee does not survive the period of distribution. In *In re Lewis, Goronway v. Richards*(a) a testator bequeathed the residue to his wife for life and in the event of her predeceasing him, then after his death to "X and Y." His wife predeceased him. It was held that X and Y were entitled to the residue as joint tenants as both X and Y survived. If X had not survived, then Y would have taken in substitution of the joint-gift.

Again, if a bequest is made "to A or his heirs," or "to A or his next-of-kin," or "to A or his representatives," and A dies in the lifetime of the testator, the legacy does not lapse but goes to the heirs or the next-of-kin or the representatives of A as the case may be. (*ill. v.*) In such case the gift is substitutional, the word "heir" meaning next-of-kin. (See Halsbury's Laws of England, Vol. 34, p. 312). In such cases, generally speaking, the word "or" implies a substitution so as to prevent a lapse(b). But if the bequest to "A and his heirs" or to "A and the heirs of his body" or to "A and his executors and administrators" and if A dies in the lifetime of the testator the gift is not substitutional. (See *ill. (i)* to sec. 97). In this connection is also to be considered the case of alternative gifts, *e.g.*, a bequest of this house or that house. In such a case a right is given to the legatee to select which property he will take, (Halsbury's Laws of England, Vol. 34, p. 36).

Rule in *Christopherson v. Naylor*.—Where the gift is to a class of persons with a substitutional gift to the children of any member of the class dying before the period of distribution, such children will take if their parent die after the date of the will and before the testator. The rule was laid down in *Christopherson v. Naylor*(c) that where there is a gift to a class, *e.g.*, to the children of A, and then a substitutionary gift of the share of any of the class who should die in the lifetime of the testator or before the period of distribution, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently, if the parent, *i.e.*, if any child of A, was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue cannot take under the substitutionary gift.

The rule in *Christopherson v. Naylor* was not followed in *In Re Williams, Metcalf v. Williams*(d) in which case the grandchildren of the son of the testator who had died *before* the making of the will were held to come under a gift to a class. The rule has been made subject to the rule laid down in *Re Potter's Trust*(e), *viz.*, that, where there is a gift to a class of persons, with substitution to their issue in case of their dying, that means, whether they are dead *when the will is made or die afterwards*, the substituted class takes in each case. (Halsbury, Vol. 34, p. 288). See also *Ganapathy v. Anamaloof*(f).

(z) *Penny v. Turner*, 2 Ph. 493.

(a) (1942) 1 Ch. 424; 194 L. T. 44.

(b) *Gittings v. M'Dermott*, 2 My. and K. 69.

(c) 1 Mer. 320.

(d) (1914) 1 Ch. 219 affirmed (1914) 2 Ch. 61.

(e) L. R. 8 Eq. 52.

(f) (1926) A. C. 462 (P. C.).

If the gift is to "my children *then* living and the children of such of my *said* children as shall be *then* dead," the testator by using the word "*said*" children shows that he is contemplating a class of children living at the date of the will and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted(*g*). But if there is anything to assist the construction, issue of members of the class dead at the date of the will may be let in. Thus, if none of the members of the original class are alive at the date of will, or if the original class is brothers and sisters and the testator has only one brother living at the date of the will, children of those then dead will come in(*h*).

In the case of a postponed substitutional gift where the donees under the original gift are a class and the substitutional gift is to the various members of that class the testator is considered to be providing for the death of members of the class between his own death and the period of distribution. Therefore as to those who die before the testator or before the time when the class is to be ascertained, the substitutional gift fails(*i*).

Time for Ascertaining the Class of substituted Legatees.—If the gift is to "A or his children and the child or children of such of them as shall have died before A," and if A dies in the lifetime of the testator leaving some children and grandchildren, then the class is ascertained at the death of the testator. If the gift is to A for life and then to B or his issue and if B dies in the testator's lifetime the class is ascertained at the testator's death(*j*). If B survives the testator and dies in the lifetime of A, the class is ascertained on B's death(*k*).

Contrary Intention: Construction of the word "Or":—It should be noted that the word "or" does not always denote an alternative gift. There are many cases in which it is changed into "and" and *vice versa*. (See Halsbury Vol. 34, p. 217). Where it appears from the will that the original and substituted legatees are to take co-ordinately the word "or" will be read "and." *Prima facie*, a gift to A or his heirs is substitutional, (see *Ill. iv*): but sometimes in a direct gift the expression "or his heirs" are held to be words of limitation (*l*). In *Jamsedji D. Mistry v. Meherbanoo Bisney* (*m*) (O.S.) the word "and" was construed into "or." In *Raju Chettiar v. Shanmugham Pillai* (*n*) the will provided for a bequest to the testator's daughter for life and "and after her death all my property should go in equal shares to such of my aforesaid daughter's, sons or sons' children as are alive," it was held that the word "or" could not be construed as "and" and after the daughter's death the property would go to her sons or if there were no sons then to sons' children.

97. Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Illustrations

- (*i*) A bequest is made—
to A and his children,
to A and his children by his present wife,
to A and his heirs,

(*g*) *Re Thompson's Trust*, 2 W. R. 218.

(*h*) *Gowling v. Thompson*, 11 Eq. 366; *Re Jordan's Trust*, 2 N. R. 57; *Jarvis v. Pound*, 9 Sim. 549.

(*i*) *Williams on Executors* 12 Edition pp. 782-784.

(*j*) *Ive v. King*, 16 Beav. 40.

(*k*) *Hobgen v. Neale*, 11 Eq. 48.

(*l*) *In re Hayden, Pash v. Pary*, (1931) 2 Ch. 338.

(*m*) *Times of India* 20th August 1941.

(*n*) A.I.R. (1941) M. 245.

to A and the heirs of his body,
 to A and the heirs male of his body,
 to A and the heirs female of his body,
 to A and his issue,
 to A and his family,
 to A and his descendants,
 to A and his representatives,
 to A and his personal representatives,
 to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(ii) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(iii) A bequest is made to A for life and after his death to his issue. At the death of A the property belongs in equal shares to all persons who then answer the description of issue of A.

[This is sec. 84 of the Succession Act X of 1865. This section does not apply to Hindus.]

This section embodies an artificial rule of construction taken from the English law of personal property.

Bequest with Words of Limitation. - Under sec. 95 if a bequest is made to a person *simpliciter* he takes the property absolutely. Under this section even if words of limitation are added the person will take the property absolutely—the difference between the two sections being that sec. 95 confers absolute interest without words of limitation; under this section the same effect is produced with the words of limitation.

Distinction between “words of Limitation” and “words of Purchase.” —If a bequest is made to “A and his heirs” the legatee intended is A and not the heirs—the word “heirs” merely points out the extent of interest given to A. A takes the property under the instrument and the heirs by descent. The word “heirs” is termed a “word of limitation.” Similarly a bequest to A and his children will confer on A an absolute bequest, if A survives the testator whether he has children or not. If on the other hand by the word “heirs” or “children” the testator indicates a particular person or persons who are intended to take as *personae designatae* it becomes a “word of purchase” and means the person or persons who would succeed to the estate of the person named if he died intestate, (see *ill. iii*). The estate given to A is defined completely and the issue are noted as a distinct class. In the illustration (i) A takes an absolute interest, the additional words being merely words of limitation(o). So, too, a gift to A for life and then to his executors or administrators gives A the absolute interest(p). The gift “in trust for A and his heirs” would create a fee simple in A but if the subsequent expression limits the extent of interest A would only take a life interest(q). See also commentary to section 93. The same words “heir,” “issue,” “family” are used in section 93 as in the illustration (i) to this section, but the distinction is that under section 93 they are words of independent gift whereas under this section they are words of limitation.

Issue :—The word “issue” is not used in sec. 93 but is given in *ill. (i)* to this section. In its usual legal sense it includes descendants of every degree, (see section 99). In a devise of immoveable property to “A and his issue” the word “issue” is a word of limitation. Under English law it creates an estate tail. (See also Halsbury Vol. 34, pp. 314-316). But the word may be used under section 93 to denote a direct and independent object of gift, *e.g.*, a bequest to A for life, and after

(o) *Krishnadas v. Dwarkadas*, (1937) Bom. 679.

(p) *Avern v. Lloyd*, 5 Eq. 383.

(q) *York Smith v. Tribhuvandas*, 19 Bom. 401.

his death to his issue does not give A an absolute interest. Here the word "issue" denotes direct objects of a distinct and independent gift. A, therefore, merely takes a life interest and the bequest belongs in equal shares to all who answer the description of issue of A, *i.e.*, lineal descendants, (*ill. iii*). The rule is that wherever there is any evidence, that the testator did not use the words, "issue," "children," etc., as word of limitation, but intended that both the parent and the children or issue should take, effect will be given to that intention and they will either take concurrently with the parent, or as purchasers after the parent's death or by substitution, *e.g.*, where the issue are to take *per stirpes*(*r*). It may also mean children only, (see Halsbury, Vol. 34, p. 314). A bequest to A, his executors and administrators confers absolute interest in A. So also if a bequest is made to A and his personal representatives. The word "personal representative" means executors and administrators. So also a gift to A for life and then to his executors or administrators gives A an absolute estate.

A gift to the heirs of A, from generation to generation confers upon them when ascertained exactly the same estate as if the gift was to X & Y the heirs of A nominatim(*s*). In *Rajah Chundernath v. Koor Gobindnath*(*t*) their Lordships of the Privy Council said:—"The words from generation to generation may in some cases mean no more than to express the absolute character of the gift." See also *Arumugam v. Ammi Ammal*(*u*) where it was held that the words "generation to generation" did not import more than "absolutely" and "for ever" under English instruments. The word "Purusannkromah" was construed to mean generation to generation(*v*). In *Muhammad v. Fatima*(*w*) their Lordships held that the word "always" and "for ever" will not invariably convey a full interest. In *Azizun-Nissa v. Tasaddug*(*x*) it was held that the word "*Hamesha*" (always and for ever) does not *per se* extend the interest beyond the life of the person named.

In *Bhoobun Mohini v. Hurrish Chunder*(*y*) the gift was "Do you and the generations (children and grand-children) born of your womb successively enjoy the same. No other heirs of yours shall have right or interest." It was held that the donee took the property absolutely. In *Richard Skinner v. Kunwar Naunihal*(*z*), the bequest was to the testator's eldest son Thomas "and to his lawful male children according to the law of inheritance" and in the event of Thomas dying without lawful male children to the testator's next male heir and in default to the female children. It was held that Thomas took a life interest. In *Dadabhoy v. Cowasji*(*a*) a Parsi lady settled her property to her for life, then for her son for life and then for "his sons and their male heirs" absolutely in equal shares as tenants in common. Kanga, J., held that the words his heirs or his male heirs were words of limitation and not of purchase and accordingly the sons took the property absolutely as tenants-in-common and this construction was upheld by Martin, C. J., in appeal and was confirmed by the Privy Council. In *Benode Behari v. Nistarini*(*b*) a Hindu testator gave the residue of his estate to his widow for life and after her death he directed his executors to give the same to such persons "who shall be his heirs." It was held that if the word "heirs" meant the persons who would be heirs at the widow's death the gift was void and the event was an intestacy. If on the other hand the word "heirs" meant the testator's right heirs that was the widow herself.

(*r*) *Re Stanhope's Trusts*, 27 Beav. 201.

(*s*) *Fardunji M. Banaji v. Mithibai*, 22 Bom. 335.

(*t*) 11 B. L. R. 86.

(*u*) 1 M. H. C. R. 400.

(*v*) *Abani Nath v. Amar Nath*, A. I. R. (1941) C. 92.

(*w*) 8 All. 39 (P. C.).

(*x*) 3 Bom. L. R. 307 (P. C.).

(*y*) 5 I. A. 138.

(*z*) 17 C. W. N. 853 (P. C.).

(*a*) 47 Bom. 349=24 Bom. L. R. 1111=A. I. R. (1923) Bom. confirmed by P. C. see A. I. R. (1925) P. C. 306.

(*b*) 33 Cal. 180 (P. C.).

Hindu Wills :—This section does not apply to Hindu wills. In *Krishnadas v. Dwarkadas* (c) a Hindu by his will bequeathed Rs. 10,000 to T and his sons and daughters. At the date of the will T had two sons and one daughter. T died in 1919 and his daughter in 1924 and the testator died in 1930. A question arose whether T took the gift absolutely and as he had died before the testator whether the bequest lapsed. It was held that as this section was not applicable to Hindus the gift was to T and his sons and daughters concurrently, that sec. 106 applied and as the two sons of T survived the testator they were entitled to the legacy.

98. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

Bequest to class of persons under general description only.

[This is sec. 85 of the Succession Act X of 1865. It applies to Hindus, etc.]

Sections 98, 111, 115, and 121 are to be read together. Sec. 98 lays down a general descriptive rule, viz., that if a bequest is to a class only those take whom the descriptions applies. Sections, 111 and 121 lay down rules for ascertaining of the class; sec. 115 lays down the limit within which a gift to a class can be made.

Definition of Class.—A number of persons are popularly said to form a class when they can be designated by some general name as “children,” “grand-children,” “nephews,” etc.; but in legal language a class is a body of persons included under some general description and bearing a certain relation to the testator or another person(d). (See also Halsbury’s Laws of England, Vol 34, p. 143). It is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons(e). It may be none the less a class though some of the individuals are named, e.g., a gift is made “to all my nephews and nieces including A.” In *Re Stanhope’s Trust*(f), there was a gift to four named daughters and all his after-born daughters, and that was held to be a class gift. But in order to constitute a named person a member of a class, he must have a common character with the unnamed members of the class, e.g., a bequest to A for life and at his death “to be equally divided amongst his surviving children and my niece R” is not a gift to a class as R has not a common character with the other members of the class(g). A gift to “the five daughters” of A or “to my nine children” is not a gift to a class(h). In *Adv-Gen. v. Money*(i) the testator “bequeathed to my grandchildren by my late daughter S, and also to my grandson F, and to his step-brother G” in equal shares a certain fund. It was held that this was a bequest to the grandchildren not as a class but to them individually as personae designate and they took the bequest as tenants-in-common and not as joint-tenants. Also a gift “to my daughters S, K and B” is not a gift to a class but as *persona designata* and the share of one of them who predeceased the testator lapsed and fell into the residue(j). Similarly where the bequest is made to the testator’s son’s wife for life with remainder to her two daughters, the gift is not to a class but to individuals, and a third daughter born before the death of the testator is not entitled to a share in the remainder(k).

(c) (1937) Bom. 679.

(d) *Kingsbury v. Walter*, (1901) A. C. 187.

(e) *Krishnanath v. Atmaram*, 15 Bom. 543.

(f) 27 Beav. 201.

(g) *Drakeford v. Drakeford*, 33 Beav. 43.

(h) *In re Smith’s Trusts*, 9 Ch. D. 117; *In re Stansfield*, 15 Ch. D. 84.

(i) 15 Mad. 448.

(j) *Sala Mahomed v. Dame Janbai*, 22 Bom. 17; 3 Bom. L. R. 785. See also *In re Harper, Plowman v. Harper*, (1914) 1 Ch. 70.

(k) *Mafatal v. Kamialal*, 17 Bom. L. R. 705.

Difference between bequest to a class and bequest to individuals.—A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute a class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator gives a legacy to be divided amongst the children of A at a particular time, those who constitute the class at the time will take; but if the legacy be given to B, C, and D, children of A, as tenants in common and one dies before the testator, the survivors will not take the share of the deceased child(*l*). On the other hand where the legacy is given to a *class* of persons in general terms as tenants in common, *e.g.*, to the children of A and one of the children dies before the testator, those who survive the testator will take the whole(*m*). Hence a bequest to a class is distinguished from a bequest to individuals in following respects:—

(1) In a gift to a class, on the death of any member of the class, the gift survives to the surviving members or member. In case of a bequest to an individual or a number of individuals the bequest or the share of any who dies lapses.

(2) In a gift to a class the class must be ascertained at one and the same time, *i.e.*, the interests of all the members of the class must vest in interest at the same time, although the class may be capable of enlargement(*n*). In case of a bequest to individuals it is not so. As for example, a gift to the daughters of A and the daughters of B is a gift to a class, because the class is ascertained at one and the same time, *viz.*, the death of the testator(*o*). Also a gift to A for life and afterwards to the children of C is a gift to a class, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life(*p*).

(3) The class may be ascertained at any particular point of time, *e.g.*, at the death of the testator, or the tenant for life or at the date when the will was made. The words of will may clearly indicate the point of time at which the class is to be ascertained, *e.g.*, in a gift to children “now living” only those in existence at the date of the will will take and all children born after that date are excluded. (Halsbury, Vol. 28, p. 714). For further commentary on the ascertainment of the class, see commentary to section 111.

Where a fixed sum of money is bequeathed to each member of a class such as the daughters of A, a daughter conceived and born after the death of the testator is excluded from taking as a member of the class(*q*).

Examples.

(1) A gift by a testator to his five named daughters and all his other sons and daughters who should be born afterwards and attain majority is a gift to a class(*r*).

(2) A gift to “my executors hereinafter named to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble equally between them,” and one of the executors named in the will predeceased the testator, it was held that the gift was to the executors as a class and the legacy survived to the two executors(*s*).

(3) A bequest is made “to the children of A begotten or to be begotten.” All the children of A in existence (including any child *en ventre sa mere*) at the death of the testator will be entitled to the bequest to the exclusion of any child or children of A who may be born after the testator's death(*l*).

(*l*) *Pestonji v. Khurshedbai*, 7 Bom. L. R. 207.

(*m*) *Viner v. Francis*, 2 Cox. 190 and other cases cited in Williams on Executors, 12th Ed. p. 693 *et seq*.

(*n*) *Kingsbury v. Walter*, (1901) A. C. 187.

(*o*) *Re Stanhope's Trusts*, 27 Beav. 201.

(*p*) *Kingsbury v. Walter*, (1901) A. C. 187.

(*q*) *In re Bellville, Westminster Bank v. Walton*, (1941) 1 Ch. 414.

(*r*) *In re Jackson*, 25 Ch. D. 162.

(*s*) *Knight v. Gould*, 2 M. & K. 295.

(*t*) *Viner v. Francis*, 2 Cox. 190; *Robertis v. Higman*, 1 Bro. C. C. 532; *Pudmanund v. Hayes*, 3 Bom. L. R. 803 (P. C.)

(4) B by his will directed as follows:—"My son-in-law N. with his wife S. and children to live in the house for ever." *Held*: It was not a gift to a class(u).

Bequest "to the children of A and B."—A gift to the children of A and B where A and B are two named persons and have not and are not capable of bearing children together has been held to mean a gift to B and the children of A. (See Halsbury's Laws of England Vol. 84 p. 304). For the construction of this term the following rules have been laid down in *Theobald on Wills*, 7th Edn., p. 298:—

(a) The *prima facie* grammatical construction of a gift to the children of A and B is that B and the children of A are entitled (v). But the context may show that the testator intended such a gift to be a gift to a class, e.g. where A is shown to stand in the same relation to the testator as the children of B(w).

(b) If A and B are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A and my brother B(x).

(c) If they do not bear the same relation to the testator, and A has children at the date of the will, while B is unmarried the gift goes to B and the children of A(y).

(d) So, too, if A is described as deceased; for instance, if the gift be to the children of the late A and B, B and the children of A will take(z).

(e) A gift for "the benefit of the children of A and of B" goes to the children of A and of B(a).

Hindus.—Secs. 98, 111, 115, 121 are made applicable to Hindus under the Hindu Wills Act. But in dealing with the wills of Hindus it must be remembered that by Hindu law a gift to persons unborn at the time of the death of the testator is void(b). Accordingly, where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of the death of the testator, the gift is held to enure for the benefit of those members of the class who are capable of taking, provided there is no other objection to the gift(b'). In *Khimji v. Morarji*(c) a Hindu by his will gave certain property after the death of the last survivor of his five sons to be divided among the sons of his sons and the daughters of his sons and in certain cases for the widows of his sons. He left five sons, three grandsons and three granddaughters. After his death two granddaughters were born. It was held that the gift to the grandsons, granddaughters and widows of sons was a gift to a class in which some of the members were not in existence at the testator's death and was therefore void.

According to Hindu law a bequest to the children of A living at his decease where some children are in existence at the date of the will is not a gift to a class of which some members might come into existence after the testator's death(d).

In case of a bequest to persons who are all members of a joint Hindu family, it does not follow that they take such property as joint property(e). In *Kherode money Dossee v. Doorgamoney Dossee*(f) the devise was to the son lately born to B and to the son or sons that may hereafter be born to him; it was held that the whole devise failed. Similarly in *Chundramoney v. Motilal*(g) the gift to the male issue of the testator's daughter was held to be void.

(u) *Krishnanath v. Atmaram*, 15 Bom. 543.

(v) *In re Featherstone's Trust*, 22 Ch. D. 111.

(w) *Aspinall v. Duchworth*, 35 Beav. 307.

(x) *Mason v. Baker*, 2 K. & J. 567.

(y) *Stummvoll v. Hales*, 84 Beav. 124.

(z) *Lugar v. Harman*, 1 Cox. 250.

(a) *Peacock v. Stockford*, 3 De G. M. & G. 73.

(b) *Tagore v. Tagore*, 9 B. L. R. 377, I. A. Sup. Vol. 47; *Mamubai v. Dossa Morarji*, 15 Bom. 443; *Richard Skinner v. Durga Persad*, 31 All. 239.

(b') *Dhanlaxmi v. Hariprasad*, 23 Bom. L. R.

433. See *Ram Lal v. Kunai Lal*, 12 Cal. 663.

(c) 22 Bom. 533.

(d) *Krishnarao v. Benabai*, 20 Bom. 571.

(e) *Kishori v. Mandra*, 13 All. 665. See also

Bai Diwali v. Patel Becharadas, 26 Bom.

445; *Gopi v. Musammal Jaldhara*, 83

All. 41; *Ashutosh v. Doorga Churn*, 6 I.

A. 182.

(f) 3 C. H. C. 315.

(g) 5 C. H. C. 497.

Construction of terms.

99. In a will—

- (a) the word “children” applies only to lineal descendants in the first degree of the person whose “children” are spoken of;
- (b) the word “grandchildren” applies only to lineal descendants in the second degree of the person whose “grandchildren” are spoken of;
- (c) the words “nephews” and “nieces” apply only to children of brothers or sisters;
- (d) the words “cousins,” or “first cousins,” or “cousins-german,” apply only to children of brothers or of sisters of the father or mother of the person whose “cousins,” or “first cousins” or “cousins-german,” are spoken of;
- (e) the words “first cousins once removed” apply only to children of cousins-german, or to cousins-german of a parent of the person whose “first cousins once removed” are spoken of;
- (f) the words “second cousins” apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose “second cousins” are spoken of;
- (g) the words “issue” and “descendants” apply to all lineal descendants whatever of the person whose “issue” or “descendants” are spoken of; and
- (h) words expressive of collateral relationship apply alike to relatives of full and of half blood; and
- (i) all words expressive of relationship apply to a child in the womb who is afterwards born alive.

[This is sec. 86 of the Succession Act X of 1865. It does not apply to Hindus, etc.]

(a) **Child or Children.**—The meaning given to the word is the primary meaning. If in a will the word “child” or “children” is used it will mean legitimate lineal descendants in the first degree only and will not include a grandchild or remoter issue. There is nothing stated in this section as regards “any contrary intention in the will”, but it is submitted that if the context and circumstances indicate an extended construction to the meaning, the word may be construed to mean grandchildren(h). It will not be construed to mean “sons”(i). In *In re Milward*,(j), land was divided to A absolutely subject to a gift over in the event of A dying leaving “no child or children”. The words “child or children” were construed as leaving no issue, so that the gift over would not take effect, if A left issue at his death.

Child en Ventre sa mere.—Sub-section (i) means a child *en ventre sa mere*. It has been adopted as a rule of construction for giving effect to a presumed intention. The law regarding this is laid down in *Villar v. Gilbey*(j¹), as follows:—

First, words referring to children or issue “born” before or “living” at or “surviving” a particular point of time or event will not in their ordinary or natural meaning include a child *en ventre sa mere* at the relevant date.

Secondly, the ordinary or natural meaning of the words may be departed from and a fictitious construction applied to them so as to include therein a child *en*

(h) *Berry v. Berry*, 3 Giff. 184; *Royle v. Hamilton*, (1799) 4 Ves. 487. (j) (1940) W. N. 231; (1940) 1 Ch. 698.

(i) *Krishnarao v. Bennabai*, 20 Bom. 571. (j¹) (1907) A. C. 139.

ventre sa mere at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date.

Thirdly, the only reason and the only justification for applying such a fictional construction is that when a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child *en ventre sa mere* must necessarily be within the reason and motive of the gift.

Fourthly, that being the only reason and the only justification for applying the fictional construction it follows that if the person who uses the words under construction confers no gift on the children or issue described as abovementioned, but confers the gift in some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child *en ventre sa mere* a benefit to which if born it would be entitled or that the child *en ventre sa mere* must necessarily be within the reason and motive of the gift made(k).

Step-child.—Ordinarily in a gift to "children" of a person, step-children will not be included but if the testator has no children but is accustomed to call his step-children by the name children, the gift will go to the step-children(l).

Unmarried son or daughter.—A gift to an unmarried child *prima facie* means a child not having been married; but it may also mean not having a spouse at the time mentioned in the will. (See Halsbury's Laws of England Vol. 34, p. 197, footnote c).

(b) **Grandchild.**—The lineal descendants of the second degree are comprehended in the word "grandchild" or "grandchildren". The word "children" may mean grandchildren in the case of a legacy to the children of a deceased person where at the date of the will there are, to the knowledge of the testator no children, but only grandchildren alive(m). "Grandchildren of any degree" includes all the testator's lawful descendants save his children(n). (See Halsbury, Vol. 34, p. 304 note l).

(c) **Nephews and Nieces.**—Children of brothers and sisters take under the gift to nephews and nieces of a person and in this respect there is no distinction between the nephews and nieces of the full blood and the nephews and nieces of half blood, *i.e.*, relationship by blood, (see sub-section h), but not nephews and nieces by affinity, *i.e.*, relationship by marriage(o). In a gift to my nephews and nieces a grandnephew will not take(p). (See also Halsbury, Vol. 34, p. 297, note (k) and p. 740 note (g)).

(d) **Cousins, First Cousins, or Cousins-german.**—These words primarily mean children of uncles and aunts. In a gift to "first and second cousins" the words will have their strict meaning unless there is something to show that the testator is not using them in their proper sense(q). (Halsbury, Vol. 34, p. 297, note (k)).

(e) **First Cousin Once Removed.**—Children of first cousin take under a gift to first cousin once removed. In a gift to first cousins, or cousins-german, first cousins once removed are not included(r). (See the Table of cousins-german Schedule I).

(k) *Elliot v. Joicey*, (1935) A. C. 209.

(l) *Re Jeans, Upton v. Jeans*, (1895) 72 L. T. 885.

(m) *Re Smith, Lord v. Hayward*, (1887) 35 Ch. D. 558.

(n) *In re Hall, Hall v. Hall*, (1932) 1 Ch. 262.

(o) *Smith v. Lidiard*, 3 K. & J. 252.

(p) *Thompson v. Robinson*, 27 Beav. 486.

(q) *Re Parker, Beniham v. Wilson*, 17 Ch. D. 262.

(r) *Sanderson v. Bayley*, 4 My. & Cr. 56.

(f) **Second Cousins.**—Second cousins are persons who have the same great-grandfather or great-grandmother. For distinction between first cousins once removed, and second cousins see *In re Parker(s)*. (See Table of Cousin-german Schedule I).

(g) **Issue and Descendants.**—A gift to “issue” includes descendants of every degree, *i.e.*, the person’s children, grandchildren and other issue of any degree of remoteness in descent. In *In re Hipwell(s¹)* the word was construed to include children and grandchildren. For the construction of the word “issue” as restricted only to “children” only five examples are given in Halsbury, Vol. 34, at p. 314. In order to restrain this construction a clear intention must appear upon the will. The words “heirs” and “issue” were held to be convertible terms in *Mariam Begum v. Waizir Begum(t)*. A gift to “offspring” was held to be confined to children only to the exclusion of grandchildren(u).

The word “descendants” applies to children, grandchildren and all other descendants of every degree of remoteness. The class of descendants taking under a gift are ascertained according to the rules for ascertaining a class. The descendants when ascertained take *per capita* and not *per stirpes*, *e.g.*, a bequest of £4,000 is given “to the descendants of F”. F left some grandchildren and some great-grandchildren. It was held that the grandchildren and great-grandchildren were all entitled to the bequest and that distribution must be *per capita(v)*. Again a testatrix directed that her property be divided equally between the descendants of T. At her death T had three sons and eleven grandchildren. It was held that the sons and the grandchildren were all entitled to the property and *per capita(w)*.

Hindus.—This section does not apply to Hindus. In *Goberdhonedus v. Prafulla Bala(w¹)*, it was held that sec. 99(g) was not applicable to wills executed by Hindus and the words “issue heirs” were construed to include descendants by blood as well as descendants by adoption.

As regards Hindus a bequest to the descendants of A has been held to include children and grandchildren living at the decease of the testator(x). In *Srinivasa v. Dandayudapani(y)* a Hindu bequeathed Rs. 25,000 to his daughter subject to a condition that she should invest the same in land and enjoy the produce and should transmit the corpus to her male descendants. After the testator’s death the daughter was delivered of a son who died in a few months; she died subsequently leaving husband who claimed the legacy. It was held that the daughter’s son had not acquired any interest as no one could be heir of a living person.

100. In the absence of any intimation to the contrary in a will, the word “child,” the word “son,” the word “daughter,” or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate.

Illustrations.

(i) A having three children, B, C and D, of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among “my children”. The pro-

(s) 17 Ch. D. 262.

(s¹) (1945) W. N. 169.

(t) 17 Cal. 234.

(u) *Lister v. Tidd*, 29 Beav. 618.

(v) *Crossly v. Clare*, Amb. 397.

(w) *Butler v. Stratton*, 3 Bro. C. C. 367; *In re*

Sutcliffe, Alison v. Alison, (1934) 1 Ch. 219.

(w¹) A. I. R. (1939) C. 637.

(x) *Arumugam v. Ammi Ammal*, 1 M. H. C. R. 400.

(y) 12 Mad. 411.

perty belongs to B and C in equal shares, to the exclusion of D.

(ii) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(iii) A, having in his will enumerated his children, and named as one of them B, who is illegitimate, leaves a legacy to "my said children". B will take a share in the legacy along with the legitimate children.

(iv) A leaves a legacy to "the children of B". B is dead and has left none but illegitimate children. All those who had at the date of the will acquired the reputation of being the children of B are objects of the gift.

(v) A bequeaths a legacy to "the children of B". B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.

(vi) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the will the reputation of being the child of A by the woman designated. B takes the legacy.

(vii) A makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.

(viii) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

[This is sec. 37 of the Succession Act X of 1865. It does not apply to Hindus, etc.]

Illegitimate Children.—The description of child, son, issue, etc., mean *prima facie* legitimate child, son, issue, etc., and, therefore, where a bequest is made to children simply without anything on the face of the will to show that illegitimate children are meant, only the legitimate children will take and evidence *dehors* the will is not admitted to prove that illegitimate children were also meant. (See ill. i.).

This is based on public policy that a gift cannot be made by will to the illegitimate children or other illegitimate relations of any person who are not born or begotten at the death of the testator. This section, however, makes an exception in favour of illegitimate children and they are allowed to take under a gift to children if the conditions laid down in this section are complied with, *viz.* :—

- (a) There must be nothing in the will to indicate a contrary intention.
- (b) The children must have acquired the reputation of being the named man's children.
- (c) That reputation must have been acquired at the date of the will.
- (d) The child must have been born at the date of the will (ill. vii). A gift to an illegitimate child not born or begotten is obnoxious to the policy of law.

But a child *en ventre sa mere*, at the date of the will, will take, (ill. viii).

Illegitimate children will generally take under the following circumstances :—

(1) If looking at the circumstances existing at the date of the will there is no possibility of legitimate children to satisfy the terms of the bequest, *e.g.*, the bequest is to the children of A *now* living and A has illegitimate children, they would take(z), (ill. ii.); or where the bequest is by an unmarried man or woman to his or her children, that would mean illegitimate children, because every will made by a man or woman is revoked by his or her marriage and, therefore, none but illegitimate children could by any possibility take under it(a).

(z) *Dover v. Alexander*, 2 Hare 275; *Burlew v. Orde*, L. R. 8 P. C. 164. (a) *Pratt v. Mathew*, 22 Beav. 328.

(2) Illegitimate children existing at the date of the will, including a child *en ventre* may take under the term "children", if they are sufficiently indicated, that is to say, where it appears that the testator meant illegitimate children, *e.g.*, where the bequest is to "my natural children" (b), (ill. vi).

(3) Wherever the general description of children in a will will include legitimate children, it cannot be extended to illegitimate children; in other words, where there are legitimate children to answer the description of "children", the rule of law is, that legitimate children only will take and no extrinsic evidence is admissible to show the intention of the testator (c).

(4) But where a testator enumerates his children and names one of them who is illegitimate and leaves a legacy to his "said children" that is a sufficient indication that the illegitimate child is intended to take. (Ill. iii).

The rule regarding "children," etc., laid down in this section applies to other illegitimate relations, *e.g.*, a reputed wife (d), or to an illegitimate nephew (e).

Evidence.—No extrinsic evidence is admissible except to prove that the illegitimate children in question had at the date of the will acquired the reputation of being the children of the testator or of the person named in the will and of the state of the family.

101. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will:—

Rules of construction where will purports to make two bequests to same person.

- (a) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.
- (b) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.
- (c) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.
- (d) Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In clauses (a) to (d) of this section, the word "will" does not include a codicil.

(b) *Metham v. Duke of Devonshire*, 1 P. Wms. 529.

(c) *Dorin v. Dorin*, L. R. 7 H. L. 568; *Paul v. Children*, L. R. 12 Eq. 16; *In re Pearce, Alliance Assurance Co., v. Francis*, (1913)

2 Ch. 674, (1914) 1 Ch. 254.

(d) *Administrator-General v. White*, 13 Bom. 379.

(e) *In re Jackson, Beattie v. Murphy*, (1938) 1 Ch. 237.

Illustrations.

(i) A, having ten shares, and no more, in the Imperial Bank of India, made his will, which contains near its commencement the words "I bequeath my ten shares in the Imperial Bank of India to B." After other bequests, the will concludes with the words "and I bequeath my ten shares in the Imperial Bank of India to B." B is entitled simply to receive A's ten shares in the Imperial Bank of India.

(ii) A, having one diamond ring, which was given him by B, bequeaths to C the diamond ring which was given by B. A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.

(iii) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(iv) A, by his will, bequeaths to B the sum of 5,000 rupees and afterwards in the same will bequeaths to B the sum of 6,000 rupees. B is entitled to receive 11,000 rupees.

(v) A, by his will, bequeaths to B 5,000 rupees and by a codicil to the will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(vi) A, by one codicil to his will, bequeaths to B 5,000 rupees and by another codicil bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(vii) A, by his will, bequeaths "500 rupees to B because she was my nurse," and in another part of the will bequeaths 500 rupees to B "because she went to England with my children." B is entitled to receive 1,000 rupees.

(viii) A, by his will, bequeaths to B the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. B is entitled to both legacies.

(ix) A, by his will, bequeaths to B the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

[This is sec. 88 of the Succession Act X of 1865. It applies to Hindus, etc.]

Cumulative Legacies.—Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both or only one, *i.e.*, whether the second legacy shall be regarded as merely a *repetition* of the prior bequest, or whether it shall be construed as an additional bounty and *cumulative* to the former benefit. On this point the *intention* of the testator is the rule of construction.

If there is nothing in the will to show what the testator intended, the following rules of construction are laid down in the Act.

(1) If the same *specific thing*, *e.g.*, a watch or a ring, is bequeathed twice to the same legatee in the same will or in the will and again in a codicil, the legatee receives only that specific thing.

(2) Where two legacies of *quantity* of *equal amount* are bequeathed to the same legatee in *one and the same instrument* the second bequest is a mere repetition and the legatee is entitled to one such legacy.

(3) Where two legacies of *quantity* of *unequal amount* are given to the same person in the *same instrument*, the legatee is entitled to both.

(4) Where two legacies of quantity, whether of *equal* or *unequal amount*, are given to the same person *by different instruments, i.e.*, one by will and the other by a codicil, the legatee is entitled to both.

Cumulative and substitutional legacies are subject to the same incidents as the original legacies, *i.e.*, as regards vesting, lapse, etc.

Admission of parol evidence

When is parol evidence admissible to show whether the testator intended to give two legacies or only one legacy? The rules as to substitutional or cumulative gifts are rules of presumption rather than rules of construction and parol evidence is admissible to rebut the presumption. It is admissible when the Court raises the presumption against double legacies, to show that the testator intended the legatee to *take both, i.e., in support of the apparent intention of the will*. But where the Court does not raise the presumption, parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will(f).

In many cases the will or codicil affords intrinsic evidence that the second gift was intended as a mere substitution for the first. So, also, if in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and the *same* sum is given, if the motive is different the legacies will be cumulative, (ill. vii). Again, where one legacy is given generally and the other for an express purpose or is contingent, the legacies will be cumulative (ill. ix), and also where the legacies are not *ejusdem generis*, e.g., if an annuity and a sum of money are given the legacies will be cumulative, (ill. viii).

102. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Illustrations.

(i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, etc., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(ii) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee.

(iii) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

[This is sec. 89 of the Succession Act X of 1865. It applies to Hindus, etc.]

The Residuary Legatee or Universal Legatee

A residuary legatee is one to whom the testator gives what remains of his property after the legacies and bequests are made. A Universal Legatee is one to whom the testator gives the whole of his property which he leaves at his death. The expression "universal legatee" is used in sec. 232. The distinction between a residuary legatee and the next-of-kin is that a residuary legatee is a claimant under the will, whereas the next-of-kin is a claimant dehors the will.

No particular words are necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be expressed that the surplus or residue of his estate after payment of debts, legacies and costs of administration shall be taken by the person or persons designated(g), e.g., a testator bequeaths to A "the rest of my property," or "the remainder of my

(f) *Hookey v. Hatton*, 2 White and Tudors L. C. 321, 1 Bro. C. C. 390.

(g) *Durga v. Attul Chandra*, (1988) 1 Cal. 75;

Fanindra v. Adm.-General, 6 C. W. N. 321; *Manorama v. Kali Charan*, 81 Cal. 166.

property," or "the residue of my property," or even simply "I leave to A" (without stating what was left), these words will constitute A the residuary legatee. Even the words *et cetera*, when not construed *ejusdem generis*, are held to pass the whole residuary estate^(h). The words "surplus" and "residue" both have identical meaning. "Surplus" means that which is left over, "residue" means that which is left⁽ⁱ⁾. The words money, goods, chattels, estate and effects will also pass the residue, if not confined to things *ejusdem generis*. (See also Williams on Executors, 12th Edn., pp. 994-995 as to what words will and what words will not convey the residue. See also illustrations to sec. 102). In *Re Rustonji F. Lentin*(j), a testator appointed his wife executrix and entrusted all his property to her with instruction that 12 months after her death whatever "may have been left behind her as residue" the same be divided equally between his sons and daughters. Then clause 12 of the will provided, "after payment of all the above-mentioned sums and legacies as to whatever property may remain all that belongs to my wife and I hereby give the same to her." The wife died leaving a will and a question arose whether she took the property under the residuary clause absolutely. It was held that she was not the residuary legatee.

Property to which
residuary legatee
entitled.

103. Under a residuary bequest the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration.

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue.

[This is sec. 90 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section corresponds to sec. 25 of the English Wills Act, 1837.

What is Residue.—It is settled law that there is no residue until after the payment of debts, funeral and testamentary expenses, costs of administration of the estate of the testator and the payment of all the legacies. Until all these are paid, there is no residue. Residue means all of which no effectual disposition is made by the will,^(j¹).

Property to which Residuary Legatee is entitled.—Under this section the residuary legatee is entitled to (1) all the lapsed legacies, (2) all legacies which fail to take effect, and (3) property bequeathed under the residuary clause. In other words he is entitled to whatever may fall into the residue after the making of the will by lapse, invalid disposition, or other accident or by acquirement subsequent to the date of the will^(k), and whether known or unknown to the testator. But in *Subodhchandra v. Bhupalika*(l) it was held that in construing the wills of Hindus, this rule should not be applied and the property unknown to the testator did not pass under the residuary clause. A bequest of "all my personal property and effects" was held to pass to the residuary legatee all immoveable

(h) *Chapman v. Chapman*, (1877) 4 Ch. D. 800; *Ashutosh v. Doorga Churn*, 5 Cal. 438; 6 I. A. 182.

(i) *Chapman v. Brown*, 6 Ves. 404; *Dwarkanath v. Burroda Persaud*, 4 Cal. 443.

(j) 22 Bom. L. R. 355.

(j¹) *Skrymsker v. Northcote*, 1 Sw. 566.

(k) *Fanindra v. Adm.-General*, 6 C. W. N. 321; *Dwarkanath v. Burroda Persaud*, 4 Cal. 443; *Camani v. Barefoot*, 26 Mad. 433.

(l) 60 Cal. 1406. (See also *Kunthalammal v. Suryaprakasuroya*, 38 Mad. 1096.)

property which was bequeathed to charity which charity was void under sec. 118(^u). A residuary bequest carries not only everything not disposed of but everything that in the event turns out not to be disposed of or whether the disposition fails, *e.g.*, where a testator bequeaths all his estate, *except* money laid out in stock, mortgage, etc., to A and the money in stock and on mortgages to B and B dies before the testator so that the gift to him lapses, A will take under the residuary bequest the property given to B(^m). But if the testator has shown some intention with regard to the excepted property inconsistent with its ever falling into the residue, effect must be given to that intention(ⁿ). For example, A on board a ship made his will and gave to his mother, if alive, his gold rings, buttons, and chest of clothes, and to his executor who was on board with him his red box, arrack, and *all things not before bequeathed*; and at the time of his death A was entitled to leasehold estate by the death of his father of his right to which he was ignorant, the executor will not be entitled to the leasehold estate, (see sec. 88, ill. *ii.*)(^o).

A residuary legatee is entitled to the property over which the testator has a general power of appointment and which the testator has ineffectually attempted to appoint, *e.g.*, a testatrix, having a power of appointment over a sum of stock, appointed the stocks to her sons A and B, and she left the residue of her property to A. B died before her. It was held that A was entitled as residuary legatee to the share intended for B(^p).

Particular and General Residue

Gift of the residue may be the gift of a particular residue or may be of a general residue. A particular residue is the residue of a particular portion of the testator's property, *e.g.*, if a testator disposes of a part of his land at X to A and the residue of that land to B, the bequest to B is the bequest of a particular residue and will not carry any portion of the general residue. In *Pursuttamdas v. Govind*(^q) a question arose whether a portion of the particular residue which lapsed, augmented that residue or whether it fell into the general residuary clause and it was held that it fell into the general residue. In *Kunthammal v. Suryaparakasaroaya*(^r), a testator after mentioning in his will his immoveable property proceeded to write as follows, "the house No. 25 and ready money were received by me under an order of the High Court according to my adoptive father's will". He then proceeded to give certain legacies and concluded "the sum which may be left after deducting the abovementioned legacies shall be utilised in my name for *pooja*, etc." Unknown to the testator there was a sum of Rs. 4,000 lying to his credit in Court. It was held that Rs. 4,000 was not disposed of under the above clause, and as there was no other residuary clause there was intestacy as regards the said sum.

Rights of the Residuary Legatee.—A residuary legatee has a right to insist that in the course of the first year after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him. In order to effect this object it is the duty of the executor to sell the estate or at all events so much of it as is required for the payment of debts, legacies and funeral and testamentary expenses, and to ascertain the clear residue as soon as possible(^s). The executor would not be justified (though he may be entitled) in selling more than sufficient to pay debts, legacies, and funeral and testamentary expenses in the case of a residuary legatee being absolutely entitled to the residue(^t).

(^l) *Elizabeth v. Suherland*, A. I. R. (1935) R. 71.

(^m) *Evans v. Jones*, 2 Coll. 516.

(ⁿ) *Jairam v. Kessowji*, 4 Bom. L. R. 555.

(^o) *Cook v. Oakley*, 1 F. Wms. 302.

(^p) *Spoooner's Trusts*, 2 Sim. (N. S.) 129.

(^q) 28 Bom. L. R. 917 (F. C.).

(^r) 38 Mad. 1096.

(^s) *Wightwick v. Lord*, 6 H. L. C. 217.

(^t) *Cooper v. Cooper*, L. R. 7 H. L. 53.

If the executor is also the residuary legatee he cannot help himself out of the residuary estate without making provision for the debts, specific legacies and other matters which are prior thereto. It is only after these matters have been cleared that the estate of the testator becomes the property of the residuary legatee(u). In *Gobardhandas v. Gopaldas*(v), the executors who were also residuary legatees had taken money of the estate for their own use before debts and legacies were paid were held guilty of a breach of trust.

Hindus.—In construing the wills of Hindus care should be taken. The residuary clause in the form in which it appears in English wills is unknown and unless a testator has expressed a clear intention to give everything undisposed of to the residuary legatee, the legatee will not be entitled to it(w).

104. If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

Time of vesting
legacy in general
terms.

[This is sec. 91 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section must be read in connection with sec. 119 and the Explanation attached to the same(x).

This section deals with the time of vesting when there is no postponement of payment or possession. The expression "in general terms" means without specification of time when the legacy is to be paid. In such a case the legacy vests in the legatee on the day of the death of the testator. If the legatee is dead at that date, the legacy will lapse under sec. 105. But if the legatee survives the testator but dies before receiving the legacy, it shall become payable to his representatives. Although under this section the legacy vests on the date of the death of the testator, he cannot demand payment of the legacy until the expiration of one year from the testator's death, (see section 337). It must also be remembered that until the assent of the executor is given under sec. 332, the legatee has only an inchoate right to the legacy. The vesting, however, takes place under this section on the death of the testator and he can transfer or assign the legacy, (see commentary to sec. 332). A legacy vested under this section is divested by the legatee disclaiming the legacy(y).

Section 119 deals with the vesting of the legacy when by the terms of the will the payment or possession is postponed. Under that section also unless there is anything to the contrary expressed in the will the legacy vests in the legatee on the testator's death. But the difference between this section and section 119 is that under this section the legacy vests in possession whereas under section 119 the legacy vests in interest. In the first case the legatee is entitled to demand possession immediately and if the assets are sufficient for the payment of the debts and liabilities of the deceased, the executor may pay the legacy although he is not bound to do so for one year under sec. 337. Under section 119 the legatee has no immediate right to the possession or payment of his legacy until the time fixed by the will has arrived. There is nothing in law to prohibit a man from making a provision in his will that certain persons shall only actually take shares in his property after his death contingent upon their being alive at the time when the said property will be divided as directed by the testator. In *Bachman v.*

(u) *Fordham v. Walkis*, 10 Hare. 217.

(v) 60 Cal. 30.

(w) *Kunthalammal v. Suryaprakasaroaya*, 38

Mad. 1096.

(x) *Bachman v. Bachman*, 6 All. 583.

(y) *Lakshamma v. Ratnamma*, 38 Mad. 474.

Bachman(z) it was argued that if such contingent provision is made it would place the shares at the mercy of the trustees or executors who would have it in their power to postpone the division indefinitely at their own pleasure. To that the answer given is that if the testator says so in plain language the Court must give effect to his obvious intention. If the testator's language is clear and unambiguous and there is no uncertainty as to his meaning and if he has placed such large powers in the hands of the trustees and executors effect must be given to it. In that case it was held that looking to the terms of the will that share to one of the legatees did in law vest in him at the death of the testator but he having died prior to the division of the estate it was divested and the gift overtook effect.

This section was invoked in *Secretary of State v. Parijat*(z¹), as to when a residue becomes vested in the legatee but their Lordships did not express any concluded opinion. They, however, observed that the legatee of a share in the residue has no interest in any of the property of the testator until the residue is ascertained. Until the claims against the testator's estate for debts, legacies and testamentary expenses have been satisfied the residue does not come into actual existence. It is non-existent until that event has occurred. The possibility that there will be residue is not enough. It must be actually ascertained.

Effect of Vesting in Possession.—The effect of vesting in possession is that under this section the legatee becomes the owner of the property bequeathed and he can deal with it in his lifetime by any deed or by will. Consequently the property can be attached by his creditor(a).

105. (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

In what case legacy lapses.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations

(i) The testator bequeaths to B "500 rupees which B owes me." B dies before the testator; the legacy lapses.

(ii) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses.

(iii) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(iv) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(v) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(vi) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses.

[This is sec. 92 of the Succession Act X of 1865. It applies to Hindus, etc., with this addition that the words "son", "sons", "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born, and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son, see Schedule III, Cl. 5.]

(z) 6 All. 583.

(z¹) 38 Bom. L. R. 125.

(a) *Ramanuj v. Swami Pillai*, 22 M. L. J. 228.

Lapse.—The term “lapse” is applied to the failure of a testamentary gift owing to the death of the legatee before the death of the testator either before the making of the will (ill. *ii*) or after the making of the will (ill. *i*). In order to entitle the legatee to his legacy he must survive the testator, otherwise the legacy cannot take effect. The testator is not restricted in making his will to the legatees in existence at the date of the will. A legatee may not be born at the date of the will but he must be in existence when the testator dies. A confirmation by codicil of a legacy given by will to a legatee who has died since the date of will does not prevent a lapse. (Halsbury, Vol. 34, p. 135.)

Even when the legacy is given to A and his executors, administrators and assigns, if the legatee A dies before the testator, the legacy lapses(*b*). Where the testator and the legatee die together, *e.g.*, when both are drowned in the same ship and it is not proved who survived the other, the legacy will lapse. (See ill. *vi*).

In England by sec. 184 of the Law of Property Act 1925. (Statute 15 Geo V. ch. 20) it is provided, “In all cases where after the commencement of the Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other, such death shall (subject to any order of the Court) for all purposes affecting the title to property be presumed to have occurred in the order of seniority and accordingly the younger shall be deemed to have survived the elder(*c*). In *Kulkarni v. Laxmibai*(*d*), such a presumption was raised and upheld but with respect it is submitted it is not a correct decision because Indian Evidence Act negatives such a presumption. Even in England where the sec. 184 is not applicable, such a presumption is not permissible(*e*).

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator, and the onus of proof will be on the representatives. Not only a legacy but also a bequest to a debtor of the *debt* due from him will lapse like any other legacy, if the debtor does not survive the testator. (Ill. *i*).

In *Bachman v. Bachman*(*f*) a testator directed his executors to sell and convert his property into money and to divide the same among several named legatees when they should attain 21 in case of males and in case of females when they attained that age or married. One of the legatees who had attained 21 died five months after the death of the testator leaving issue. It was held, legacy vested in the deceased legatee and the issue were entitled to it.

The doctrine of lapse applies to contingent legacies (see ill. *v*). In the case of a contingent legacy it will lapse on the death of the legatee before the testator whether the contingency does or does not happen and the gift over will take effect(*g*).

It also applies to powers exercised by will. The appointee must survive the donee of the power in order to take(*g*¹), but the interest of persons taking in default of appointment does not fail by the death of the donee of the power before the testator(*h*).

Circumstances that bring about Lapse.

The only event mentioned in this section is the death of the legatee in the lifetime of the testator. But there are other circumstances also which bring about lapse, *e.g.*, if a bequest is made for a particular charitable institution and

(b) *Elliot v. Devenport*, 1 P. Wms. 83.

(c) *In re Lindop, Lee Barber v. Reynolds*, (1942) W. N. 132; *Hickman v. Peacey*, (1945) W. N. 153.

(d) A. I. R. (1922) B. 347; 18 I. C. 814.

(e) *In re Cohn*, (1945) 1 Ch. 5.

(f) 6 All. 583.

(g) *Willing v. Baine*, 3 P. W. 113.

(g¹) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61.

(h) *Hardwick v. Thurston*, 4 Russ. 380.

that institution is non-existent when the testator dies, the bequest will lapse(i). But if there is a general charitable intention the bequest will not lapse but will be applied *cy-pres*(j). Also if a legacy is given to a woman "as long as she remains unmarried" and she marries in the lifetime of the testator, the legacy will lapse.

"Unless it appears by the Will that the Testator intended that it should go to some other person."

A contrary intention within the meaning of this expression is not to be presumed by the use of the expression "to A and his children" see ill. ii, which gives the whole interest to A under sec. 97, or by the use of the words "*poutra poutradi krame*"(k). In order to prevent lapse the testator must do two things, he must in clear words exclude the lapse and he must clearly indicate who is to take in case the legatee should die in his lifetime, (ill. iii)(l). A mere declaration that the legacy shall not lapse is not sufficient to prevent lapse(m). But where a bequest is to "A or his heirs," or to "A or his issue" the word "or" is construed as substitutional so as to prevent a lapse(n). In the following cases the legacy will not lapse:

(a) If there is an express intention to the contrary, *e.g.*, when it is clear that in the event of the legatee predeceasing the testator, an alternative bequest is intended to be substituted as under section 96.

(b) In case of a legacy to a legatee for life with remainder to another legatee, if the tenant for life dies before the testator, the remainder overtakes effect upon the death of the testator (Ill. iv). So, if a legacy be given to A on his completing the eighteenth year with a limitation over to B if A should die before completing the eighteenth year and A dies in the lifetime of the testator under the prescribed age, the legacy over to B does not lapse but will take effect(o). But the rule is different when A dies in the lifetime of the testator *but after completing his eighteenth year*. In such a case every part of the bequest lapses, *i.e.*, the legacy to A lapses and the legacy to B also does not take effect. See ill. (v).

(c) If a legacy is given to two persons jointly and one dies before the testator the other takes the whole, (sec. 106). The doctrine of survivorship prevents lapse, but not if the gift is to persons as tenants-in-common, (see section 107).

(d) In the absence of a contrary intention in the will, a bequest to a child or other lineal descendant of the testator does not lapse if the child or other lineal descendant dies before the testator, (sec. 109).

(e) Where the bequest is to a trustee for another and the trustee dies before the testator the bequest does not lapse, (sec. 110).

(f) Where the bequest is to a class, (section 111).

Examples.

(1) A bequeaths to B Rs. 500 and also directs that a debt of Rs. 200 due to A from B should not be demanded by his executors as he released B from the debt. B dies before A. The legacy of Rs. 500 lapses. As to the debt of Rs. 200 the question is whether it was a release or a legacy, and it was held that it was a legacy which had also lapsed(p), (ill. (i)).

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| <p>(i) <i>In re Rymer</i>, <i>Rymer v. Stanfield</i>, (1895) 1 Ch. 190; <i>In re Tharp</i>, <i>Laugrigg v. People's Dispensary for sick Animals</i>, All. E. R. 3th Sept. 1942.</p> <p>(j) <i>Malchus v. Broughton</i>, 11 Cal. 591 in appeal 13 Cal. 193.</p> <p>(k) <i>Saroda Prasad v. Debendra Nath</i>, 21 P. L. T. 37; <i>Jagdish Chandra v. Rai Pada</i>, A. I. R. (1941) Pat. 458.</p> | <p>(l) <i>Shiv Devi v. Nauharria Ram</i>, 21 Lah. 583; <i>Camini v. Borefoot</i>, 26 Mad. 433.</p> <p>(m) <i>Browne v. Hope</i>, 14 Eq. 343; <i>Pickering v. Stamford</i>, 3 Ves. 493.</p> <p>(n) <i>Gittings v. McDermott</i>, 2 M. & K. 69.</p> <p>(o) See <i>Miller v. Warren</i>, 2 Vern. 207, and other cases cited in foot-note (g) Williams on Executors, 12th Edn., p. 787.</p> <p>(p) <i>Maitland v. Adair</i>, 3 Ves. 231.</p> |
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(2) A legacy is given to A and his executors, administrators and assigns. A dies before the testator. The legacy lapses(*q*).

(3) A legacy is given "to A or his representatives", or "to A or his heirs". A dies before the testator. The legacy will not lapse; the word "or" generally implies a substitution so as to prevent a lapse(*r*).

(4) A legacy is given to trustees in trust for G for life and in case G should die in the lifetime of her husband, as she should appoint and in default of appointment to her children; but if she should survive her husband then to her absolutely. G survived her husband but died in the lifetime of the testator. The legacy to G lapses and the children of G are not entitled(*s*). (See ill. (*v*)).

(5) A testator bequeathed a sum of money to his wife for life and after her death to A absolutely if he should be living at her decease, and if not, to A's son; A outlived the wife but died in the testator's lifetime. Held the legacy to A lapsed and that the gift to his son did not take effect(*t*).

(6) A legacy was given in trust for Sarah until she attained majority and then to pay the same to her. But if she should die a minor leaving a child or children then in trust for such child or children and in default of children to other persons. Sarah attained majority and married; but she died in the lifetime of the testator leaving two children. Held, that the legacy lapsed and the children were not entitled(*u*).

Effect of Lapse.—Unless a contrary intention appears in the will a lapsed legacy will form a part of the residue of the testator's property and shall be included in the residuary bequest. If the will contains no residuary clause, the lapsed legacy will go to the heirs of the testator as if he had died intestate, (secs. 107-108).

Legacy does not lapse if one of two joint legatees die before testator.

106. If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

[This is sec. 93 of the Succession Act X of 1865. It applies to Hindus, etc.]

Sec. 106 deals with a bequest to persons as joint-tenants; sec. 107 deals with a bequest to persons as tenants-in-common. The essential characteristics of a joint tenancy are (1) unity of possession, (2) unity of interest, (3) unity of title and (4) unity of the time of commencement of title. A tenancy-in-common has only unity of possession(*u*¹).

Joint Tenancy.—Where a legacy is given to several persons concurrently, a question arises whether these persons take as joint tenants or as tenants-in-common. This will depend on the context of the will. A simple money legacy to A and B (as in illustration) will *prima facie* be to them as joint tenants so that if A dies before the testator B will take the whole legacy. Although the section speaks of a legacy to two persons, the same rule applies if the bequest is to several persons, the share of any one that dies will not lapse but will go to the survivors(*v*). In *Barnes v. Allen*(*w*), there was a devise of residue to the testator's wife and if she died without issue to the testator's two brothers or if one of them should be dead to the survivor. Both the brothers died in the lifetime of the wife. It was held that the legacy was to the two brothers as joint tenants and went to the representatives of the survivor. This case was followed in *Jairam v. Kuverbai*(*x*).

(*q*) *Elliot v. Davenport*, 1 P. Wms. 83.

(*r*) *Gittings v. McDermott*, 2 M. & K. 69.

(*s*) *Calthorpe v. Gough*, 3 Bro. C. C. 395.

(*t*) *Williams v. Jones*, 1 Russ. Ch. 517.

(*u*) *Doo v. Brabani*, 3 Bro. C. C. 393.

(*u*¹) *Money*, 15 Mad. at p. 469.

(*v*) *Mamubai v. Dossa Morarji*, 15 Bom. 543.

(*w*) 1 Bro. C. C. 180.

(*x*) 9 Bom. 491 at pp. 507-509.

In *In re Lewis, Goronway v. Richards(y)*, a testator bequeathed the residue to his wife and in the event of her predeceasing him then to M and/or J. The wife predeceased the testator. In a summons for directions by the executors whether the gift was to M and J as joint-tenants, it was held that the gift was to M and J as joint-tenants. Again, although in this section it is stated that if the legacy is to two persons jointly and one of them *dies* the survivor takes the whole, the same rule applies if one of the legatees is incapable of taking by reason of his having attested the will or otherwise, the other who is capable of taking will take the whole(z). This case was followed and the rule therein laid down was applied in *Nandi Singh v. Sita Ram(a)*. The general tendency of the authorities seems to be to lean against joint tenancy in the construction of wills(b). But if the will does not in any way indicate an intention to create a tenancy-in-common the presumption will be in favour of joint tenancy(c). (See also Halsbury, Vol. 28, p. 780 Halsham Edn. Vol. 34, p. 354).

An example of joint tenancy in the construction of a Parsi's will will be found in *Navroji v. Perozbai(d)*, where a Parsi testator's will contained the following clause :—"After the death of Motlibai (daughter of the testator) Motlibai's two sons Navroji and Nusserwanji are the owners of whatever property and estate belonging to me ;" it was held that Navroji and Nusserwanji took the estate as joint-tenants. Horwill J., in *Rathnathammal v. Arulanandam(e)* has observed while commenting on this case that the learned Judges did not in that case interpret correctly the Privy Council decision in *Jageswar Narain v. Ramchandra Dutt (f)*. This case is referred to in *Francis Ghosal v. Gabri Ghosal(g)*. In *Re March(h)* a legacy given to a husband and wife without specification of shares was held to create a joint tenancy. This case was referred to in *Arakal v. Domingo(i)*.

Christians:—Christians are governed by this Act and in the matter of construction of the will of a Christian if the bequest is made simply to two persons then on the principles of English law as propounded in this section they would take as joint tenants and on the death of one the survivor would take the whole property(e).

Joint Tenancy as applicable to Hindus.—Although this section applies to Hindus, etc., in construing the wills of Hindus the rule laid down in this section should be applied with great care. This section was applied to Hindus in *Krishnadass v. Dwarkadas(j)* where a Hindu testator by his will bequeathed "Rs. 10,000 to T and his sons and daughters," and it was held that the bequest created a joint tenancy and the sons of T who alone survived the testator were held entitled to the legacy. In *Hirabai v. Lakshmibai(k)* a Hindu by his will appointed his wife Hirabai and his adopted son N. "as his heirs." N. died first leaving a widow Lakshmibai. Hirabai claimed the whole estate contending that the gift was to her and N. as joint tenants and that this section applied, but it was held that Hirabai took only a widow's estate under Hindu law and that the property went to N's widow as his heir. The Madras High Court in *Vaidynanda v. Nagammal(l)*, applied this section in construing the will of a Hindu testator who gave his property jointly to his brother's son and Nagammal the wife of the brother's son whom he had brought up from childhood and had married her to his brother's son with power of alienation, and it was held that the gift was to the two legatees as joint tenants.

(y) (1942) 1 Ch. 424.

(z) *Humphrey v. Tayleur*, 1 Ambl. 136.

(a) 16 Cal. 677 (P. C.).

(b) *Administrator General of Madras v. Money*, 15 Mad. 448 at p. 469.

(c) *Arakal v. Domingo*, 34 Mad. 80.

(d) 23 Bom. 80.

(e) A. I. R. (1946) M. 12 at p. 15.

(f) 23 Cal. 670.

(g) 31 Bom. 25.

(h) 27 C. D. 166.

(i) 34 Mad. 80.

(j) (1937) Bom. 679.

(k) 9 Bom. 573.

(l) 11 Mad. 253.

But this case was overruled by their Lordships of the Privy Council in *Jogeswar Narain v. Ram Chandra(m)* where their Lordships observed that the learned Judges of the High Court of Madras were not justified into importing into the construction of a Hindu will an extremely technical rule of English conveyancing. "The principles of joint tenancy appear to be unknown to Hindu law except in the case of coparcenery between the members of an undivided family." Jogeswar Narain's case was followed in *Gopi v. Musammat Jaldhara(n)* where a Hindu by his will bequeathed the whole of his property to his two married daughters without specification of shares and it was held that they both took as tenants-in-common and not as joint tenants and to the same effect is *Muthu Meenakshi v. Chandra Sekhara(o)* where a bequest to two wives was held to be a bequest to them as tenants-in-common. To the same effect is *Har Prasad v. Sukh Devi(p)*, and *Ram Piari v. Krishna Piari(q)*. Despite the Privy Council decision, some Courts in India continued to apply the English principle of joint tenancy to Hindu wills until in *Mt. Bahu Rani v. Rajendra Baksh(r)* their Lordships of the Privy Council put the matter beyond doubt. In *Hemanta v. Sudhansu(s)* there was a bequest of an annuity to two persons and it was held that the bequest was in joint tenancy. This section was construed in the case of a bequest to the two wives of the testator as a bequest in joint tenancy with right of survivorship(t).

The trend of the decisions lay down the following propositions, viz., that where property is given without specification of the individual interests to persons who are members of a joint Hindu family it does not necessarily follow that they take as joint tenants(u). If the bequest is to persons who constitute such a family the *prima facie* view is that they take in severalty and that those who argue in favour of joint tenancy have to show some clear foundation for it in the terms of the will. If on the other hand the bequest is to persons who are incapable of forming a Hindu joint family they generally take as tenants-in-common(v).

107. If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Effect of words showing testator's intention to give distinct shares.

Illustration.

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have had if A had survived the testator.

[This is sec. 94 of the Succession Act X of 1865. It applies to Hindus, etc.]

Tenancy-in-Common.—As equity leans against joint tenancy and favours a tenancy-in-common any words which in the slightest degree indicate the testator's intention to give distinct shares will create a tenancy-in-common. Thus the expression "in equal shares" or "share and share alike" or "equally to be divided between them" or "respective shares" or "between them" or even "respectively" alone were held to create a tenancy-in-common(w). Even without such words, the Courts will lean in favour of tenancy-in-common if the context of the will will so permit. In *Mst. Jio v. Mst. Rukman(x)*, a devise in favour of the testator's daughter and her husband without specification of shares was

(m) 23 Cal. 670; 23 I. A. 37.

(n) 33 All. 41.

(o) 27 Mad. 498.

(p) 37 All. 241.

(q) 43 All. 600.

(r) 60 I. A. 95; 64 M. L. J. 555.

(s) 25 C. W. N. 262.

(t) *Bhoba Tarini v. Peary Lall*, 24 Cal. 646

at p. 650.

(u) *Kishori v. Munda*, 33 All. 665.

(v) *Yathirajulu v. Mukunthu*, 28 Mad. 363 at p. 373.

(w) *Yathirajulu v. Mukunthu*, 28 Mad. 363; *Administrator-General v. Money*, 15 Mad. 448; *Har Prasad v. Sukhdevi*, 37 All. 241.

(x) 8 Lah. 219.

construed to be a tenancy-in-common. In *Mangaldas v. The Secretary of State*(y) a testator appointed his wife and his nephew's two sons as "joint owners" of his property and it was held that the bequest created a tenancy-in-common. In short anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy(z). Tenancy-in-common may also be created by severing a joint tenancy. Thus where a Hindu bequeathed to his nephew and his wife some land with power of alienation, and the nephew alienated the land, it was held that the alienation severed the joint tenancy (a).

Distinction between a Joint Tenancy and Tenancy-in-common.—In joint tenancy there is unity of possession, unity of interest, unity of title and unity of the time of the commencement of such title. Between a joint tenancy and a tenancy-in-common the only similarity that exists is unity of possession. Except as to that a tenant-in-common is as to his undivided share in the position of the owner of that share.

Tenancy-in-common with Survivorship: *Rule in Cripps v. Wolcott*, 4 Madd. 15.—Where there is a gift to a number of persons and the survivors and survivor of them, the survivorship in default of any expressed intention of the testator *prima facie* refers to the period of distribution, *e.g.*, where a legacy is given to A and B "to be equally divided between them or the survivor of them" the survivorship is to be referred to the period of division, *i.e.*, if there is no previous bequest then the death of the testator. If A and B survive the testator they take the bequest as tenants-in-common in equal shares and on the death of either A or B thereafter the share of the one so dying will not go to the survivor. But if A dies before the testator and B survives the testator, the bequest will go to B. (Ill. *i.*, sec. 125). If a previous life estate is given, the period of division is the death of the tenant for life. If the tenant for life dies in the testator's lifetime, the survivors are fixed at the testator's death. In *Camini v. Barefoot*(b) a testator devised a certain property to his wife for life and then to his children J, C and F, or the survivors or survivor of them. J attested the will. On the death of the wife, F brought a suit claiming a moiety of the property as J was debarred from taking the gift. It was held that J's share had lapsed and fell into the residue and did not augment the share of C and F. (The subject of "Survivorship" is further treated under sec. 125).

Effect of death of one of the Tenants-in-common.—This section lays down the rule that in the case of a bequest to two or more persons as tenants-in-common, if one of the legatee dies before the testator, his share will not go to the survivor as in the case of a joint tenancy but will fall into the residue if there is a residuary clause in the will. If there is no such residuary clause or where the bequest to two or more persons as residuary legatees then the share of the person who dies before the testator will go as undisposed of (see sec. 108) and will be distributed as on intestacy. There is, however, one exception to this rule under section 111 where the bequest is to a class of persons as tenant-in-common the share of any member of the class who predeceases the testator does not lapse but goes to the other members of the class. But where the bequest is to several named persons, as tenants-in-common, the shares of any who die before the testator lapse(c).

When lapsed share
goes as undisposed
of.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

(y) 30 Bom. L. R. 54.

(z) *Robertson v. Fraser*, 6 Ch. 696; *Armstrong v. Eldridge*, 3 Bro. C. C. 214.

(a) *Jogeswar v. Ram Chandra*, 23 I. A. 37;

23 Cal. 670.

(b) 26 Mad. 433.

(c) *Page v. Page*, 2 P. Wms. 489.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

[This is sec. 95 of Succession Act X of 1865. It applies to Hindus, etc.]

Under sec. 103 a legacy that lapses will form a part of the residue and will go to the residuary legatee. This section comes into operation when the residue itself lapses by the death of the residuary legatee before the testator or in any other manner. Where the residue is undisposed of or lapses it will go as on intestacy and be divided amongst the next-of-kin of the deceased and all the next-of-kin will share in spite of the fact of any one being expressly excluded by the will(d). If the residue that lapses is of a particular residue, it will fall into the general residue. When there are several residuary legatees and the residue is given to them as tenants-in-common the share of any one, who dies in the testator's lifetime, will lapse and will not accrue in augmentation of the remaining parts as a residue of a residue but will devolve as undisposed of; when a bequest is declared void and there is no disposition of residue it would be dealt with under this section. In *Adm.-General v. Lazar(e)*, there was a bequest of residue to three persons in equal shares. One of the attesting witnesses was the wife of one of the legatees and consequently the gift to that person failed under sec. 67; it was held that the share of that legatee was undisposed of under this section.

If the residue is undisposed of it must be divided amongst all the next-of-kin of the testator as on intestacy notwithstanding the fact that the testator has by his will directed that one of them shall take no share in his property(f). In England, however, the case of *Johnson v. Johnson* is, if deciding the point, considered as overruled, (see *Jarman on Wills* 7th Edn. 655 foot-note(t)) and the rule in England is that where the testator in his will makes a declaration excluding one or some only of the next-of-kin in clear and appropriate language, it would be valid and would operate as a gift by implication to the rest of the share of those who are excluded. The general rule of construction is that a testator cannot by a mere declaration alter the mode of devolution prescribed by law in case of intestacy except by giving to some one else(g).

This section is based on the English rule in *Skrymsher v. Northcote(h)* which was followed in *Vedabala Debi v. The Official Trustee of Bengal(i)* where residue was given on trust which failed on the ground of uncertainty and it was held that there was a resulting trust of the residue to the heirs of the testator as on intestacy. Modern decisions, however, have doubted the correctness of that decision. They lay down that if there is in the will an intention to the contrary that intention must be given effect. In *Re Parker, Stephenson v. Parker(j)* a testator bequeathed the residue to A, B, C, and D who should attain 21 with a gift over of the share in default of such persons. A died under 21 and his share lapsed; it was held that having regard to the gift over there was no intestacy but A's share accrued to B, C and D.

109. Where a bequest has been made to any child or other

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death

(d) *Toolseydas v. Premji*, 18 Bom. 61; *Erasha v. Jerbat*, 4 Bom. 537.

(e) 4 Mad. 244.

(f) *Johnson v. Johnson*, 4 Beav. 318.

(g) *Pickering v. Pickering*, 3 Ves. 492.

(h) 1 Swan 566.

(i) 62 Cal. 1062; 39 C. W. N. 1154.

(j) (1901) 1 Ch. 408.

of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A, and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D.

[This is sec. 96 of the Succession Act X of 1865. It applies to Hindus, etc., with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III, cl. 5.]

This section corresponds to sec. 33 of the English Wills Act, 1837.

This section is an exception to the doctrine of lapse. To prevent lapse three conditions must be fulfilled, (i) the bequest must be to the child or other lineal descendants of the testator, (ii) the child or lineal descendant dies in the lifetime of the testator leaving a lineal descendant who survives the testator, and (iii) there should be no contrary intention in the will. This section does not substitute for the predeceased legatee the lineal descendant whose existence is the event or condition which excludes the lapse, but gives the legacy to him absolutely as though he had survived the testator, and it is therefore disposable by the will of the legatee, (see ill.). The word "child" used in this section does not include an illegitimate son(k) but includes an adopted child in the case of Hindus.

It does not, however, in any way alter the way in which the estate of the person predeceasing the testator is to be administered. It simply increases and becomes part of the estate of the child to be administered under the law in force at the date of the death of such child. It does not alter the persons entitled to it under the law in force at the death of the person predeceasing the testator. In *Re Hurd, Stott v. Stott*(l) the testatrix made a will on 19th January 1923 leaving the residue to one of her daughters. The daughter died intestate in September 1923 leaving a husband and three daughters one of whom was illegitimate but was legitimised under the Legitimacy Act of 1926. The testatrix died in April 1939 leaving six children and three granddaughters. On a summons to determine whether the granddaughter who was legitimised was entitled to a share, it was held that sec. 33 of the Wills Act (corresponding to sec. 109) applied, and, although, the daughter for the purpose of preventing lapse, was deemed to have died in 1939 immediately after the testatrix the gift became the part of her estate to be administered under the law in force at the date of her death in 1923.

Further the expression used in this section is "lineal descendant," whereas under the corresponding section 33 of the English Will's Act the word "issue" is used. Therefore it does not extend to any other heir of the deceased legatee(m). But in *Mohammad v. Aziz-un-Nisa*(n) it was held that the bequest would take effect in favour of the heirs of the legatee. To prevent lapse under this section it is not necessary that the lineal descendant who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee. It is sufficient that any lineal descendant, e.g., a grandchild of the legatee, should be in existence at the death of the testator(o). Further the legacy will not go to the lineal descendant of the child of the testator but will be deemed to belong to the predeceased child of the testator and will go to all his heirs if he has died intestate or will belong to those under his will if he has died leaving a will, (see illustration).

(k) *Jadish Chandra v. Rai Pada*, A. I. R. 299.
(1941) Pat. 458.

(l) (1941) 1 Ch. 196.

(m) *Ramamirthan v. Ranganathan*, 24 Mad.

(n) A. I. R. (1939) Oudh 437.

(o) *In the goods of the Parker*, 1 Sw. & Tr. 523.

The rule is equally applicable in the case of a bequest to a child already dead at the date of the will(*p*). This rule applies only in the case of a bequest to a legatee as a *persona designata*; and not where the gift is to a class not ascertainable until the death of the testator(*q*).

In *In re Wolson, Wolson v. Jackson*(*r*) it was held that sec. 38 of the English Wills Act (which corresponds to this section) did not apply to a gift to a child contingent on her attaining the age of 25, the child having died in the testator's lifetime under 25 and the interest of the child lapsed. If the gift is to the children of the testator as a class a child of the testator who has died in his lifetime leaving "issue" at the testator's death such issue will not take by virtue of this section and the bequest will go to the surviving children, (*Halsbury's Law of England*, Vol. 34, p 145. Hailsham Edn.).

Examples.

(1) A father by his will bequeathed his house to his son and the son died in his father's lifetime leaving issue and leaving a will by which he bequeathed all his estate and effects to his father. *Held*, that by virtue of sec. 38 of the English Wills Act (corresponding to sec. 109) the house passed under the father's will to the son absolutely and as the son must be deemed to have survived his father, the devise under the son's will failed and there was an intestacy in respect of it(*s*).

(2) A testator gave Rs. 5,000 to his son's daughter J. The testator died in 1881. J died in 1879 leaving a child B. B sued to recover the legacy. *Held*, J was in point of law in existence at the time of the testator's death under sec. 109, because a lineal descendant of hers survived the testator and B was entitled to the legacy(*t*).

(3) A testatrix by her will dated 3-6-37 bequeathed property in trust for all her children living at her death in equal shares "Provided that if any child shall die in my lifetime leaving a child or children living at my death who being a male attained 21 or being a female attained that age or marry then the last mentioned child or children shall take and if more than one equally between them the share which his, her or their parent would have taken if such parent had survived me." The testatrix died on 15-3-38. Her son W had died on 29-9-17 leaving three children who were living at the death of the testatrix and had attained the age of 21. It was argued that as W was dead before the date of the will her children were not entitled but it was held that they were entitled to a share(*u*).

Hindus:—This section previously applied to wills executed under the Hindu Will's Act. It did not, therefore, apply to wills executed outside the town of Madras (*v*). But cl. (c) of sec. 57 now makes this section applicable to all wills executed on or after 1st January, 1927, in all parts of British India. This section is not in conflict with the *Tagore case*, because under this section the legatee, under the testator's will, although dead at the time of testator's death, must be treated as in existence at that time in contemplation of law, because a lineal descendant of his survives the testator(*w*). Their Lordships of the Privy Council in construing the term "lineal descendant" occurring in a conveyance held that it is not restricted to male descendants only. It includes all the descendants male as well as female(*x*).

110. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

Bequest to A for benefit of B does not lapse by A's death.

[This is sec. 97 of the Succession Act X of 1865. It applies to Hindus, etc.]

- (*p*) *Mower v. Orr*, 7 Hare, 438; *In re Valentine, Kennedy v. Birchall*, (1940) 1 Ch. 425.
 (*q*) *Olney v. Bates*, (1885) 3 Drew, 319.
 (*r*) (1939) W. N. 282.
 (*s*) *Re Hensler*, 19 C. D. 612.
 (*t*) *Jitu Lal v. Bindu Bibi*, 16 Cal. 549.

- (*u*) *In re Valentine*, (1940) 1 Ch. 425.
 (*v*) *Ramamirathan v. Ranganathan*, 24 Mad. 299.
 (*w*) *Ramaswamy v. Kupuswami*, 13 M. L. J. 351.
 (*x*) *Bhimnath v. Srimati Tara*, 33 C. W. N. 837 (P. C.); A. I. R. (1929) P. C. 162.

This section is another exception to the doctrine of lapse. If property is bequeathed to A in trust for B the beneficial interest of B will not lapse by the death of the trustee A in the lifetime of the testator.

111. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Survivorship in case of bequest to described class.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(i) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but before the death of A. C and D survive A. The legacy will belong to C and D, to the exclusion of the representatives of E.

(ii) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D, and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E, his executor. D has survived A. D and E are jointly entitled to so much of the lease-hold term as remains unexpired.

(iii) A sum of money was bequeathed to A for her life and after her decease, to the children of B. At the death of the testator, B had two children living, C and D, and, after that event, two children, E and F, were born to B. C and E died in the lifetime of A, C having made a will, E having made no will. A has died, leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E and one to F.

(iv) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the life of B, D and E have survived B. One-third of A's lands belong to D, E and the representatives of C, in equal shares.

(v) A bequeaths 1,000 rupees to B for life and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(vi) A bequeaths 1,000 rupees to "all the children born or to be born" of B to be divided among them at the death of C. At the death of the testator, B has two children, living, D and E. After the death of the testator, but in the lifetime of C, two other children F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F and G, to the exclusion of the after-born child of B.

(vii) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

[This is sec. 98 of the Succession Act X of 1865. III. (b) is omitted. It applies to Hindus, etc. with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III., cl. 5.]

Bequest to Class.

This section refers to a simple gift to a described class of persons directly and lays down the rule that the thing bequeathed shall go only to such of the members of the class as are alive at the death of the testator.

In construing a gift to a class, the first principle is to ascertain whether the test of a *class* laid down in section 98 applies. If that test is satisfied then the next step is to ascertain who are the members of that class under this section and for this purpose it is essential to find out from the will the period of distribution. If this period is ascertained then the next test is to find out if that period infringes the rules against perpetuities laid down in section 114. If it does then the bequest to such a class shall be void to the extent laid down in section 115.

This section contemplates the case of deferred possession and not deferred vesting and lays down two rules for ascertaining the number of the members of the class. *First*—Date of the death of the testator when the bequest is simple, *e.g.*, as in illustration (i) “to the children of B.” All the children of B living at the date of the death of the testator form the class. *Second*—Date subsequent to the date of the death of the testator, *e.g.*, by the intervention of a life interest as in illustration (ii), “to A for life and after his death to the children of B.” All the children of B living at the death of the testator take a vested interest. It will make no difference by the addition of words “born or to be born” or “begotten or to be begotten.” Such words are intended to refer to all the children born between the date of the will and the death of the testator(y).

The rule for ascertaining the class where the bequest is immediate is simple. In a simple bequest to “the children of A” all the children living at the testator’s death will take to the exclusion of those born afterwards.

The rule of construction is that a bequest to a class simpliciter at a future period is confined to those taking at the testator’s death(z). If A has no children at the testator’s death the bequest is void under section 112. It is not so according to *English law*; there the bequest would go to all the children of A born at any time after the death of the testator, (see *Halsbury’s Laws of England*, Vol. 28, p. 716, footnote (a) *Hailsham England Vol. 34*, p. 277.)

The rules for ascertaining the class are complicated when the period of distribution is other than the death of the testator. The period of distribution may be postponed through (1) conditions attached to the gift or (2) by some prior gift and here comes into operation the rule against perpetuity which makes the subject more difficult. However, the following are the principal rules deducible from standard works.

Exception.

(1) By Reason of a Prior Bequest. Intervention of life Interest:—

This Exception lays down a rule of construction that where property is bequeathed to a class of persons standing in a particular degree of kindred to a specified individual but the possession of that class is deferred until a time later than the death of the testator because of or by reason of a prior bequest or otherwise, then such property shall go to such of them as are then alive *and to the representatives of any of them who have died since the death of the testator*(a). If the bequest is by way of legal remainder to a class all the members of the class who are living at the death of the testator take a vested interest, letting in all who come into existence

(y) *Dias v. DeLivera*, 5 A. C. 128; *Bhagavati v. Kalicharan*, 38 I. A. 54; 38 Cal. 468 (See ill. vi).
(z) *In re Bellville, Westminster Bank v. Wal-*

ton, (1941) W. N. 145.

(a) *Devisme v. Mello*, 1 Bro. C. C. 536; *In re Dawe’s Trusts*, 4 Ch. D. 210, (*Halsbury’s Laws of England Vol. 34 pp. 268-269*).

after the death of the testator and before the termination of the life interest, they in their turn also taking a vested interest, (see ills. *ii, iii, iv, vi*). In such a case the gift is not immediate but it vests in all the children in existence at the death of the testator, subject to the diminution of those shares as the number is augmented by future births during the life of the life tenant(*b*). The words "born or to be born" will not extend the class even when the gift is after a life interest. In *Pestonji v. Khurshedbai*(*c*) a bequest was made to Dossibai for life and after her death the corpus was to be divided between her issue according to the Parsi Intestate Succession Act. The testator died in 1885 when Dossibai had two sons and two daughters. One son F died in 1899. One daughter died in 1885. Dossibai died in 1904. It was held that the legacy became vested in the issue of Dossibai on testator's death and that Dossibai was the stock and not the testator. To the same effect is *Sree Chand v. Kasi Chetty*(*d*).

If the bequest is to A for life, then to the children of B who shall attain the age of eighteen years, the class will be fixed as regards exclusion at the death of A, or when the eldest child of B attains eighteen, whichever is last, *e.g.*, a bequest is made to A for life with remainder to the children of B on their attaining the age of eighteen years. B has three children C, D, and E. C has attained the age of eighteen years when A died. The bequest will go to C, D and E to the exclusion of any child of B born afterwards. If C had not attained majority when A died and if F is born to B before C attains that age, the bequest will go to C, D, E, and F to the exclusion of any child born afterwards.

A child *en ventre sa mere* at the time when the class closes must be admitted to a share, even though the word "living" or "born" be added to the description(*e*).

As the interest vests in each member of the class as he comes into being, although he may die before the period of distribution, the representatives of such as have died since the death of the testator will be entitled along with those alive at the period of distribution (see ills. *iv*. and *v*).

"Or Otherwise."

(2) **Conditions attached to the gift.**—If the bequest is simply to "All the children of A on the eldest child of A attaining majority" it is a good bequest and the period of distribution is the attainment of majority by the eldest son of A, (see ill. *vii*). If the eldest son dies a minor then the period of distribution is when the next son of A attains majority. Similarly if the bequest is to "All the children of A when they attain the age of 21" the bequest is good and the period of distribution is as follows :—If any child of A had attained the age of 21 at the death of the testator the period of distribution is the death of the testator(*f*). If not, then the period is fixed after the death of the testator at the date when any child of A first attains that age. The share of each child becomes vested on its attaining 21, such share would vary directly as the number of children who had then died infants and that on each child attaining majority it would take a contingent proportionate interest in the share of each of its junior brothers and sisters which would become vested on the death of each of the latter under 21(*g*). (See *Gray on Perpetuities*, 3rd Edn., p. 332). In this connection it should also be remembered that when a gift is made to the children of a certain person on attaining a particular age, the age must be such as not to offend the rule against perpetuities, *e.g.*, if the bequest is to all the grandchildren of the testator on their attaining 25, such a gift is bad for the vesting is postponed for more than 21 years. The cases in which gifts by will

(b) *Sprackling v. Ranier*, 1 Dick. 344, (*Halsbury* Vol. 34 p. 275).

(c) 7 Bom. L. R. 207.

(d) A. I. R. (1933) M. 885.

(e) *Doe v. Clarke*, 2 Hy. & Bl. 399.

(f) *Hagger v. Payne*, 28 Beav. 474.

(g) *Agnew v. Mathews*, 1 M. H. C. R. 17.

to the grandchildren of the testator or to the children of a living person on their attaining the age greater than 21 have been held void are given at page 374 of Gray on Perpetuities, 3rd Edn., and the subject is treated under sec. 115. On the same principle a bequest "to the children of A who attain 21 and the sons who attain 21 of such of the children of A as die under 21 *per stirpes* is void; for here the class is composed of children and grandchildren and the vesting in the grandchildren is postponed beyond the rule against perpetuities. (Law of Perpetuities by Asutosh Mukhopadhyay, p. 148; Gray on Perpetuities, 3rd Edn., p. 338). But a gift by the testator "to all my children when they attain the age of 25" or "to such children of A as shall attain the age of 25," A having died before the testator is a good bequest as the bequest is to all the persons existing at the death of the testator(h), and the period of distribution is when any child attains the particular age. (See Law of Perpetuities in British India by Mukhopadhyay, p. 100; see the illustration where the children of a third person and not the testator's own children are spoken of).

(3) **Gift of a Fixed sum to each member of a class:**—It is stated in Hawkins on Wills 1st Edn., p. 73 that the rule which "admits objects born after the testator's death and before the period of distribution to share in a bequest only applies where the total amount of the gift is independent of the number of objects amongst whom it is to be divided and is, therefore, not increased by the construction adopted. But the gift of a certain sum to each member of a class of objects at a future period is confined to those living at the testator's death. Thus under a gift of £500 to all and every the children of A payable at 21, the children born after the testator's death and before the eldest child attains 21 are included; but if the gift be of £50 *each* to all and every the children of A payable at 21, the children living at the testator's death alone are entitled. The reason given is that in the latter case, if after born children were admitted, the distribution of the personal estate of the testator would have to be postponed till it could be ascertained how many legacies of the given quantity would be payable. But this rule does not apply where the inconvenience referred to by Hawkins does not exist or is expressly contemplated by the testator, *e.g.*, where a fund is set apart out of which the legacies are payable(i).

There are a certain number of cases of a gift to a class fixing the period of distribution when the youngest member of the class shall attain majority. In *Leeming v. Sherratt*(j) there was a gift of residue to trustees for sale and conversion "when the youngest of my children shall attain the age of 21 years equally share and share alike." One child who had attained 21 died before the youngest child attained 21. It was held that he had a vested interest and was transmissible to his representatives. All the cases on this point were considered in the case of *Lodwig v. Evans*(k). In such cases the vesting takes place on any child attaining the age of 21 but the period of distribution is postponed until the youngest child shall arrive at that age and all the children born upto that date are let in(l). In *Maseyk v. Fergusson*(m) a testator gave the residue of his property upon trust to divide the same "among the children of my brothers A and B to be divided amongst them in the proportion of two shares to males and one share to females, the share of each son to be paid to him on his attaining 21 and the share of each daughter on her attaining that age or marrying whichever first occurred." After the death of the testator but before the period of distribution a son was born to B and one of the sons of A died intestate and unmarried. It was held that the period of

(h) *Southern v. Woollaston*, 16 Beav. 166; *Williams v. Teale*, 6 Hare 239.

(i) *In re Bellville, Westminster Bank v. Walton*, (1941) 1 Ch. 414.

(j) 2 Hare 14.

(k) (1916) 2 Ch. 27; see also *In re Kipping*, (1914) 1 Ch. 62.

(l) *Hughes v. Hughes*, 14 Ves. 256.

(m) 4 Cal. 670.

distribution was when any one son attained majority or any one daughter married whichever first occurred and that the after-born son of B was entitled and that the share of the deceased son of A went to his surviving brothers and sisters in equal shares. In *Umrao Singh v. Buldeo Singh*(n) a testator gave his property to his three sons who were minors with a direction that the same should not be partitioned "until all my three sons attain majority." It was held that the condition restraining the partition was void and the period of distribution was when the eldest son attained majority.

The rule to be deduced from these cases is known as the rule in "*Andrews v. Partington*"(o). "Where the postponement of enjoyment is due to conditions attached to the gift the period of distribution is considered to be as soon as the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share if the class were then not susceptible of increase" (Halsbury's Laws of England, Vol. 28, p. 718; Hailsham Edn., Vol. 34 pp. 271-272).

CHAPTER VII.

Of Void Bequest.

Bequest to person by particular description, who is not in existence at testator's death.

112. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Illustrations.

(i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

[This is sec. 99 of the Succession Act X of 1865. It applies to Hindus, etc., with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.]

There are four cases in which a bequest becomes void, and these are treated in this chapter. They are :—(a) A bequest to a person who is not in existence at the testator's death is void.

(b) A bequest to a person who is not in existence at the testator's death subject to a prior bequest is void unless it comprises the whole of the testator's interest, in other words a life interest to an unborn person is void.

(c) A bequest the vesting of which is delayed beyond the life of existing person and 18 years is void.

(d) A bequest to charity by a testator having a nephew or niece or nearer relation is void unless the will is executed 12 months before his death and deposited with the Registrar within six months of its execution.

Bequest to Unborn Persons :—This section refers to bequests that are void if made to persons who are not in existence at the testator's death and where the bequest is made by a particular description and must be distinguished from sec. 105. Section 105 deals with the case of a legatee already born but who dies before the testator. In that case the legacy lapses and falls into the residue. Under this section the legacy is to an unborn person and becomes void and goes as on intestacy. If the legatee is not in existence at the testator's death, the bequest is void. *Prima facie* a gift to the wife of A who has a wife living at the date of the will goes to that wife and no other(p). If A has no wife at the date of the will, it will go to the wife of A living at the testator's death. If A has no wife living at the testator's death the bequest will be void (Ill. i). According to English law in the last case the bequest will go to any woman who shall first answer the description of the wife of A at any subsequent period, (Jarman on Wills, 5th Edn., p. 303).

Exception :—Exception deals with the two cases of a deferred bequest to an unborn person, one where the gift is deferred by reason of a prior bequest and second where it is otherwise deferred. Ills. (ii), (iii) and (iv) are examples of gifts deferred by reason of a prior bequest, and ill. (v) is an example of a bequest otherwise deferred. In order to entitle an unborn person to take he must come into existence when the bequest becomes payable. If he has once been born it is immaterial whether he is alive or dead at the termination of the prior estate. His representatives take in such a case, (see ill. iii and v).

Hindu Law and Bequest to Unborn Persons.—A Hindu cannot make a bequest to a person not in existence at his death. Therefore, the exception to this section is to be applied to the wills of Hindus subject to this fundamental rule of Hindu law.

Prior to the passing of the Hindu Will's Act 21 of 1870 a gift by a will to a person unborn at the time when the testator died was void and this view was confirmed by their Lordships of the Privy Council in *Tagore's Case* decided in 1872. That decision came with a surprise upon some of the members of the profession. When the Hindu Wills Act was passed a question arose whether that Act had altered the law. Wilson, J., in *Alangamanjori Dabee v. Sonamoni Dabee*(q) held that the rule of construction laid down in *Tagore's case* did not apply to the wills of Hindus since the passing of the Hindu Will's Act. But that decision was reversed in Appeal. It was held by the Appeal Court that although by the Hindu Will's Act sec. 99 of the Act of 1865 (the present section 112) was applied to the wills of a Hindu governed by that Act nevertheless the Hindu Will's Act by section 3 expressly enacted that "nothing in the Act contained shall authorise any Hindu

(p) *Burrows Trusts*, 10 L. T. N. S. 184.

(q) 8 Cal. 157 (in appeal 8 Cal. 637).

to create in property any interest which he could not have created before the 1st of December, 1870." Their Lordships held that the words "to create in property any interest" applied both to the quantity and the quality of the interest created and in their nature and in ordinary meaning included a capacity of a donee to take. They reversed the decision of the lower Court and held that the bequest to the sons and daughters of the testator who had no sons at the time the testator died was void, and the bequests dependent upon that were also similarly void. A similar doubt was expressed by Pontifex, J., in *Cally Nath v. Chunder Nath*(r) where discussing the judgment given by Wilson, J., in *Alangamonjori's case* his Lordship expressed the view that "it is scarcely likely that the Legislature could have intended to make any radical alteration in the Hindu law," when the legislature enacted the Hindu Will's Act.

Alangamajori's case was again considered in the year 1911 in *Dinesh Chandra v. Biraj Kamini*(s). There the question was whether there was a valid testamentary disposition in favour of the wives of the two sons of the testator who at the date of the death of the testator had been unmarried but had subsequent to the date of the death of the testator had married to persons who were both living at the death of the testator, and whether in view of section 99 of the Succession Act of 1865 a gift to the two ladies was invalid in law. It was held that although section 99 was incorporated in the Hindu Will's Act, sec. 20 (present section 24) was not incorporated and, therefore, the definition of kindred and consanguinity did not apply to the Hindus, though under the Hindu law the wife was standing in the relationship of kindred to her husband. And it was held that the two wives should be deemed to be in existence at the date of the death of the testator and that the gift to them was a valid gift. The Nagpur High Court has also held that a bequest by the person to his relation's would be wife who was in existence at the testator's death was valid(t).

In this state of law the three Acts, viz. the *Madras Act No. 1 of 1914*, Act No. 15 of 1916 and Act No. 8 of 1921 were enacted. These Acts validated the bequests in favour of an unborn person subject to the limitations in respect of the disposition by will as those contained in secs. 118, 114, 115 and 116 of this Act.

Madras Act No. I of 1914.—This Act called the Hindu Transfers and Bequests Act was an Act of the Madras legislature. By sec. 3 as amended by Act XXI of 1929 it is provided that no disposition of property by a Hindu whether by transfer *inter vivos* or by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, subject to the limitations and provisions mentioned in sec. 4, i.e., in respect of dispositions by will, those contained in secs. 118, 114, 115 and 116. The Madras High Court held the Act to be invalid so far as the wills made in the city of Madras were concerned or wills relating to immovable property in the city of Madras(u).

Hindu Disposition of Property Act XV of 1916 :—This Act was accordingly enacted by the Central Legislature and received the assent of the Governor-General on 28th September 1916. It extends to the whole of British India, except the province of Madras: Provided that the Governor-General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras. Sec. 2 of the Act enacts that "subject to the limitations and provisions specified in this Act no disposition of property by a Hindu, whether by transfer *inter vivos* or by will shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition. The limita-

(r) 8 Cal. 378 at p. 389.

(s) 39 Cal. 87; 15 C. W. N. 945.

(t) *Ramdulari v. Bishweshwar*, 18 N. L. R.

143; A. I. R. (1923) N. 105.

(u) *Soundarajan v. Natarajan*, 44 Mad. 446 (in appeal 48 Mad. 906).

tions and provisions are (a) in respect of dispositions by transfer *inter vivos*, those contained in Chapter II of the Transfer of Property Act, and (b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of this Act. (See sec. 12 of Act XXI of 1929).

Hindu Transfers and Bequests (City of Madras) Act VIII of 1921 :—

This Act was enacted to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the city of Madras. It received the assent of the Governor-General on 27th March 1921. The Act applies to all transfers *inter vivos* and wills made by persons governed by Hindu law who are domiciled within the limits of the Ordinary Original Jurisdiction of the High Court of Madras. In the case of transfer *inter vivos* or wills executed before the date of this Act, "the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to 14th February, 1914 (i.e. the date when the Madras Act I of 1914 came into force and which was held not to apply to the city of Madras). Sec. 3 as amended by Act XXI of 1929 enacts that subject to the limitations and provisions specified in sec. 4 no disposition of property whether by transfer *inter vivos* or by will shall be invalid by reason only that any person for whose benefit it may have been made was not born, at the date of such disposition. The limitations and provisions are in respect of transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act and in respect of dispositions by will those contained in secs. 113, 114, 115 and 116 of the Succession Act, 1925.

In *Venkayamma v. Narasamma*(v) it was held that if a testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of Act I of 1914 then by virtue of that Act the disposition would be valid. This was followed in *Muthuswami Ayyar v. Kalyani Ammal*(w). In *Shanmuga Dewar v. Shanmuga Dewar*(x) it was held that if the final vesting was to take place after the passing of the Act, it would validate the disposition and in *Sivarama Aiyar v. Gopala Krishna*(y) it was held that the Act applied to all cases of vesting after the date of the Act, though the testator died before the Act.

In *Kothandaraman v. Arumuga*(z) a Hindu testator who died on 17th February, 1910 made a will of his self-acquired property whereby he bequeathed the residue of his estate to his grandsons (all sons of his sons) in equal shares when they became of age until which time the estate was to be managed by the executors. No grandson was born to the testator at the time of his death; but two sons were born in 1921 to one of the sons of the testator and another son was born to another son of the testator. This son filed a suit claiming partition to which he *inter alia* joined as defendants the two other grandsons and also one son of the testator, (all other sons of the testator having died previously). It was contended by the defendants that despite the provisions of the Hindu Transfers and Bequests (City of Madras) Act the bequests to grandsons was invalid, for two reasons (a) as the testator had died in 1910, i.e., before the Act came into operation and there was no vesting of the bequests until the grandsons attained majority and (b) the bequests of the residue to unborn grandsons was invalid because the testator did not make any provision for an intermediate estate. Both the contentions were negatived on the ground that the Acts of 1914 and 1921 allow property to be left by will to a person unborn at the date of the will, the only restriction being sec. 114 of the Succession Act and that the estate was vested in the executors who were to hold the residue until all the unborn grandsons became of age when there was to

(v) 40 Mad. 540.

(w) 40 Mad. 818.

(x) 53 I. C. 203.

(y) 47 M. L. J. 337; see also *Kudapa v. Kakai*, 31 M. L. J. 33.

(z) (1945) Mad. 795.

be an equal division among them. But as one of the sons of the testator was still alive, there was a possibility of sons born to him. Until the possibility of the grandsons being born was extinguished the plaintiff was not entitled to claim an equal division; and the suit was premature.

113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to person not in existence at testator's death subject to prior bequest.

Illustrations.

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(ii) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at the time of testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

[This is sec. 100 of the Succession Act X of 1865. It applies to Hindus, etc., with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.]

Bequest to Unborn Persons.—In the case of a gift to an unborn person—unborn meaning not born at the date of the testator's death—this section enacts that in order that a bequest to such a person should be valid it must comprise the whole of the interest of the testator in the thing bequeathed, if the bequest is subject to a prior bequest. This section is to be read in conjunction with section 112 for if the bequest is direct and the person is not born at the testator's death, the bequest is void, e.g., a bequest is made to the eldest son of A and A has no son born to him at the death of the testator, the bequest is void. This section can come into operation only when the bequest to an unborn person is postponed by the intervention of a life or some other interest in the thing bequeathed. In such a case this section enacts that in order that a bequest to such a person should be valid it must comprise the whole of the remaining interest of the testator, e.g.,

if a property is bequeathed to A for life, and after his death to A's eldest son. If A has no son born at the death of the testator but A has an eldest son at his death, the bequest to A's eldest son is good as it comprises the whole of the remaining interest of the testator. The same law is enacted by section 13 of the Transfer of Property Act.

This section is often confounded with section 114 as a rule against perpetuities, but it is not so. The perpetuity section is 114. This section deals with the subject of gifts to unborn persons and it lays down the limit of the *quantum* of interest that can be given to an unborn person, *viz.*, that you cannot give a life interest or any other limited interest to an unborn person, that if a bequest is intended to be made in favour of an unborn person, then the testator must give the whole of the beneficial interest to that unborn child in order that it should be valid, and that if the whole of the remaining interest is not given such a bequest is wholly void. This section has nothing to do with the vesting of the bequest unto the unborn person but deals only with the *quantum*. To what limit the vesting can be postponed is the rule against perpetuity which is treated in the next section 114.

“Unless it comprises the whole of the Remaining Interest:”—In *Putlibai v. Sorabji*(a) the testator by his will bequeathed his family house to his executors upon trust to permit his daughter during her lifetime and until her death or marriage whichever shall first happen and all his sons and their respective families during as well as after the respective lives of such sons, including the widows any of his male descendants to occupy the said house and to make use of the furniture free of rent during their respective lives and until the youngest of his grandsons living at the death of the last survivor of his sons shall attain 18 years. Clause 11 of the will provided that on the expiration of 10 years or after the death of the last surviving son whichever should first happen, the house (subject to the right of residence) should be divided into five shares of which one was to go to each son for life. If he died, the persons presumptively entitled to the corpus were to have the income till the death of the last survivor of his five sons. By clause (12) each son was given a power to appoint in favour of his own sons and their lineal descendants and in default of appointment, the share of each son, if he left a son or issue at the death of the last survivor of the sons, was to be held for the sons of such son and their issue *per stirpes* and if any son died without issue then for the widow and daughters and the issue of predeceased daughter. Clause 15 gave over the share of any beneficiary who alienated his share and clause 16 put an end to the interest of any beneficiary who ceased to profess Zoroastrian faith or married a non-Zoroastrian. It was held by their Lordships of the Privy Council that these provisions infringed the terms of sec. 100 of the Act of 1865 (present section) as the bequests to the sons, daughters, widows and issue of the testator's sons did not in all possible instances dispose of the subject-matter to which they applied and so failed to comprise the whole of the remaining interest of the testator.

Putlibai's case was decided under the Act of 1865 and it related to secs. 99, 100, 101 and 102 of the Act of 1865. Sec. 100 of that Act is sec. 113. This section was again the subject for their Lordships' consideration in *Sopher v. The Administrator General of Bengal*(b) and Putlibai's case was considered by their Lordships of the Privy Council as deciding that in interpreting wills with reference to secs. 113, 114, and 115 of the present Act “it is necessary to bear in mind that the words used must be understood with reference to the current meaning of the words apart from such technical considerations as are

(a) 25 Bom. L. R. 1099 ; 28 C. W. N. 737.

(1944) P. C. 67.

(b) 71 I. A. 93 ; (1944) M. L. J. 20 ; A. I. R.

only appropriate in English law" (see p. 108 of the Report). Sec. 113 must be read and construed in connexion with the illustrations to be found in the Act. Sec. 113 "relates to cases where two factors exist, first that the bequest is made to a person not in existence at the time of the testator's death (*e.g.* to unborn persons at that date) and secondly, that there is a prior bequest contained in the will." Their Lordships further observe that, "It is at least consistent with that decision (*Putlibai's case*) to hold (as was argued in that case) that if under a bequest in the circumstances mentioned in sec. 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and the bequest to him does not, therefore, comprise the whole of the remaining interest of the testator in the things bequeathed. That is the conclusion at which their Lordships have arrived on the words of the section read in conjunction with the other sections relating to void gifts" (see page 104 of the Report). In *Sopher's case* their Lordships were dealing with a very complicated will and in construing the will their Lordships have remarked that the first illustration to sec. 113 shows "that a bequest by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, is void, for it is not a bequest of the whole interest that remains in the testator, since it is not certain that there will be any grandchildren. A bequest to a son for life and after his death to his children who shall survive him must be bad for the same reason, since there may be no such children. The second and third illustrations would seem to show—that is not very clear from the language of the section—that however complete may be the dispositions of the will, the gift after the prior bequest may not be a life interest to an unborn person for that would be a bequest to a person not in existence at the time of the testator's death of something less than the remaining interest of the testator. How far this rule applies it is not necessary to determine in the present case; but the two illustrations show the strict sense in which the legislature has used the words 'a bequest is made,' etc. 'subject to a prior bequest.' It may be that a particular bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death; and it is clear that in cases like those two illustrations further gifts, however complete in their operation, do not save the bequest. Partial intestacy under will as a whole is not the point. The question is whether 'the later bequest' (whatever that means in a particular case) is a complete disposition of the testator's interest." (See pp. 102-108 of the Report). In *Sopher's case* the legacy given to the grandsons was not a vested legacy. It was given on a double contingency, *viz.*, the legatee surviving the widow and also attaining a particular age and unless the case came within the Exception to sec. 120 the legacy could not be deemed to be vested. Their Lordships held that the Exception to Section 120 did not apply "because it cannot be said that the fund or any part of it, is given to any grandchild 'upon attaining the age of eighteen.' He may attain that age and yet will get no interest in the corpus if he predeceases his father. The gifts of the corpus to the grandchildren are, therefore, contingent, and on the view expressed above as to the true construction of sec. 113 it must follow that the bequests to them are void, since those bequests do not comprise all the interest of the testator. This statement of law was considered in *Nusserwanji v. Gulcher (c)*. In that case a testator bequeathed a portion of the residue to her deceased sister's son and directed that the same be handed over to P's trustees "and they shall make a formal trust thereof so that it may go to the children" of P. At the date of the will and at the date of the death of the testatrix P was unmarried. He subsequently married defendant No. 1 and had a daughter V. V died shortly after her birth. Then

P died without issue. He left a will whereby he bequeathed all his property to his wife defendant No. 1 absolutely. It was held that there was no likelihood of any contingency arising nor was there any defeasance clause which would bring the case within the four corners of the observations of Viscount Maugham cited above or within Ill. (i) to sec. 113, that V immediately she was born became entitled to the bequest and it was immaterial whether she was alive or dead at the termination of prior life interest given to P; that P only took a life interest and the property went to the representatives of V.

The defeasance clause mentioned in the decision of the Privy Council was considered by Blagden, J., in *Ardeshir Baria v. Dadabhoj Baria*(d). That was a case not under this Act but under sec. 13 of the Transfer of Property Act which corresponds to sec. 113 of this Act. There was a deed of settlement whereby the settlor had settled his immoveable properties upon trust to pay during the settlor's lifetime 1/3rd of the net income to settlor for life, 1/3rd to his son A for life and 1/3rd to his son R for life provided that if either or both of his said two sons predeceased him his or their share should be paid to the settlor. After the death of the settlor the properties were to be held upon the following trusts, viz., to divide the trust properties into two equal parts and as to one of such parts called A's trust fund (a) to pay the net income thereof to A for life and (b) after A's death to divide the corpus amongst all the sons of A in equal shares with a proviso that if A predeceased the settlor A's trust fund should only be divided amongst A's sons at settlor's death. As to the other such part called R's trust fund it was to be held on similar trusts. The trust deed further provided that if A and R should each predecease the settlor without male issue surviving him the trusts should determine and the trust property should belong to the settlor absolutely. The trust deed also contained a power to the settlor to revoke or vary all or any of the trusts. At the date of the settlement A had a son born to him but he died intestate after the death of the settlor. R had a son born to him after the death of the settlor. The deed of settlement was dated 30th October 1922 and the settlor died on 10th August 1928. On an originating summons taken out by A and R who were also the trustees of the deed against the son of R and the wife of A to determine amongst others the following questions (a) whether on a true construction Rohinton the son of A (who was dead) took a vested interest in the trust property at the date of the settlement or at the date of the death of settlor and if he took whether the 2nd defendant his mother became entitled with A to the corpus of A's trust fund and (b) whether the 1st defendant (son of R who was born after the date of the settlement) took a vested interest in R's trust fund and if so on what date or (c) whether under the circumstances that had happened the trust fund reverted to the settlor;—the first two questions were answered in the negative and the last in the affirmative. In delivering the judgment Blagden, J., observed that although there was in the trust deed no allusion that the grandsons should take a vested interest only if they survived their respective fathers, still the interest of the grandsons assuming that it was a vested interest was defeasible "if (a) the settlor exercised his power of revocation and (b) if R and A's sons and their male issue predeceased R and A and they both predeceased the settlor. Moreover, in the event of any person taking under this disposition being a minor at the time his share falls into possession his power to dispose of his property is drastically controlled. An interest in property which in two possible events is defeasible and in a third possible event is controlled is obviously less than full ownership. Nor can the extent of the gift be enlarged by the fact that neither event on which it was defeasible has happened or, now, can happen."

The effect of these decisions is that a bequest can be made to an unborn person subject to the following conditions (a) if the bequest to an unborn child is

(d) (1945) Bom. 493; 47 Bom. L. R. 287.

subject to a prior bequest contained in the will, then the remaining interest bequeathed to the unborn child must comprise the whole of such remaining interest of the testator and (b) the bequest must be absolute and vested interest unfettered by any condition and not subject to any defeasance clause.

The decision in Sopher's case has upset the views of legal profession which upto then held that if to an unborn person the whole of the remaining interest was given that would be sufficient compliance with the provisions of this section, and the conditions attached to the gift or bequest or any provision reserving to the settlor in case of transfer *inter vivos* power to revoke the trust did not impugn the provisions of sec. 13 of the Transfer of Property Act or the provisions of this section in the Succession Act. But this view has now been considered erroneous by the Privy Council and a number of trusts are likely to be held bad. There was public agitation and to remedy this a bill is introduced in the Legislative Assembly called the Transfer of Property and Succession (Amendment) Act 1946, published in the Gazette of India, Part V, p. 92, dated 16-2-46, whereby it is proposed to omit sec. 13 of the Transfer of Property Act and sec. 118 of this Act with retrospective effect. If the Act is enacted, its effect so far as the Succession Act is concerned will be as follows :—

(a) In the case of an immediate bequest to an unborn person.

A gift to an unborn person is valid if such unborn person mentioned in the will comes into existence when the testator dies for if such person is not in existence at the testator's death the bequest is void under sec. 112.

(b) In the case of a deferred bequest to an unborn person by reason of the intervention of a prior bequest or otherwise. In order that such a bequest shall be valid the following conditions must be complied with :

(1) (i) There must be a prior bequest to a specified individual and the interest so bequeathed must be a life or a limited interest.

(ii) The unborn person intended to take on the termination of the life or limited interest must be alive at the death of the testator or if he is not then born he must come into existence between the death of the testator and the termination of life or limited interest (see Exception to sec. 112).

(2) In the case of a deferred bequest the vesting of the thing bequeathed must not be delayed beyond a life or lives in being and the minority of the unborn person to whom if he attains full age the thing bequeathed is to belong (see sec. 114).

Within the boundaries of these limitations a life interest or a series of life interests can be given to an unborn child or series of children provided the vesting in such unborn person is not delayed beyond the rule against perpetuity.

Hindu Law and Bequest to Unborn Persons.—This section applies to Hindus. According to the pure Hindu law a bequest to an unborn person whether of the whole or of limited interest is altogether void. A person capable of taking under a will must either in fact or in contemplation of law be in existence at the death of the testator. But this rule has been altered by the following Acts.

(a) The Hindus Transfers and Bequests Act No. I of 1914.

(b) The Hindu Disposition of Property Act XV of 1916.

(c) The Hindu Transfers and Bequests Act VIII of 1921. These Acts have been amended by Act XXI of 1929, sections 11, and 18.

The effect of these enactments is that a gift can be made to an unborn person subject to the following conditions : (a) that the gift shall be of the whole of the

interest of the testator in the thing bequeathed and not of a limited interest and (b) that the vesting is not postponed beyond the life in being and 18 years, being the rule against perpetuities as laid down in section 114.

By the proposed Bill from these Acts also reference to sec. 13 of the Transfer of Property Act and sec. 118 of the Succession Act are proposed to be omitted.

English Law different.—According to English law interest may be given to an unborn person for life or until marriage or until any other event provided it must vest within the proper period; or, so far as the rule against perpetuity alone is concerned an interest may be given to a succession of unborn persons whose interests are vested within the proper period; or to a number of unborn persons for life as tenants-in-common. In each of these cases the limitation is valid without reference to the validity of the subsequent limitation. But no limitation can be made directly to the survivor of a number of unborn persons. If the interest given to an unborn person does not vest when such unborn person attains 21, the gift is bad(e). (Halsbury Vol. 25, page 127, paragraph 225). Under this section and section 13 of the Transfer of Property Act no limited interest can be given to an unborn person whether the vesting is within the perpetuity period or not.

114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity.

Illustrations.

(i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

[This is sec. 101 of the Succession Act X of 1865. It applies to Hindus, etc., with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand-children," shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III. cl. 5.]

Rule Against Perpetuity.

Definition.—Perpetuity has been defined as the creation of “an inalienable and indestructible interest”; in its secondary or artificial sense it denotes “an interest which will not vest till a remote period.” This section lays down the rule against perpetuity. There is another rule called rule of “possibility on a possibility,” or “double possibility” which is not the same thing as perpetuity. That rule is treated in section 116. This sec. corresponds to sec. 14 of the Transfer of Property Act and sec. 12 of the Oudh Estate Act (Act I of 1865).

Perpetuity according to English Law.—After the recognition of future estates in English law and the limitations of estates in remainder to unborn children it was felt that unless some rules restraining the creation of such estates were devised, property may be tied up in perpetuity and the due bounds were settled by successive decisions. At first such future estates were allowed to take effect within the compass of an existing life(*f*), then within a *reasonable* time afterwards. Next any number of existing lives was allowed to be taken, and finally the reasonable time was settled as twenty-one years (eighteen in India) after the duration of existing lives, with the possible addition of the period of gestation actually existing. The rule has been enacted for the free and active circulation of property, both for the purposes of commerce and the improvement of land and is founded upon considerations of public policy to prevent the mischief of making property inalienable. This rule is ordinarily known as the rule against perpetuity. The rule is one of public policy. The English rule differs from the rule laid down in this section as it fixes the period at one or more life or lives in being and 21 years afterwards irrespective of the minority of the person entitled. The rule has been modified as from 1st January, 1926, by sec. 163 of the Law of Property Act 1925, which provides that a transfer shall no longer be void for remoteness merely because the property is to vest in the beneficiary on his attaining an age over 21 years, but that it shall take effect as if the age of 21 had been substituted for the age specified in the instrument.

The modern English rule against perpetuities is stated in Gray on Perpetuities, 3rd Edn., at p. 174 as follows :—

Rule 1.—“No interest is good unless it must vest if at all not later than twenty-one years after some life in being at the creation of the interest.” In other words the period fixed is a life or lives in being and eighteen years in India and twenty-one years in England with the addition of the period of gestation in case where gestation actually exists(*g*). A devise or bequest to children “born” or to the children “living” at a given period includes a child *en ventre* at that period and born afterwards(*h*). If the vesting is delayed beyond that period then the rule applies and the gift is void. Therefore the rule lays down two essentials, *firstly*, that the limitation must necessarily take effect if it takes effect within the prescribed period, and *secondly*, if at the time of its creation the limitation is so framed as not *ex-necessitate* to take effect within the prescribed period, that is, if the limitation is bad in its inception, it will not become valid by reason of the happening of subsequent events which bring the time of its actual vesting and taking effect within the prescribed period, *e.g.*, if land is devised to A for life and after his death to the eldest son of B, on his attaining 24 the limitation to the eldest son of B is void in its inception and even if at the death of A, B has a son who has already attained 24 or may attain 24 within 21 years of A’s death it will not make the limitation valid. As stated in Jarman on Wills in deciding on the question of remoteness, it is an invariable principle that regard is had to possible and not actual events; and the fact that the gift might have included objects too

(f) *Duke of Norfolk’s case*, (1681) 3 Ch. Cas. 1.

372 (H. L.).

(g) *Cadell v. Palmer*, (1838) 1 Cl. and Fin.

(h) *In re Joyce*, (1934) 1 Ch. 140 at 145.

remote is fatal to its validity. The word "may" used in this section supports the above statement that this section applies not only where the delay has actually occurred but also where it is possible that the delay may occur.

As regards the life or lives in being the vesting may be postponed for any number of lives provided they are all in being when the interest is created and it is not necessary that these persons should take any interest. To take an extreme case a testator may validly postpone the vesting till the lives of all persons now living in the world. A typical case of this kind occurred in *Thellusson v. Woodford*(i) in which the vesting was postponed by the testator during the lives of all his children, grandchildren and great-grandchildren, who were living at the time of his death, for the benefit of some future descendants, thus strictly keeping within the rule. In practice, however, the test that is applied in such a case is whether the devise will or will not tend to a perpetuity by rendering it almost if not quite impracticable to ascertain the extinction of the lives described and will be avoided or supported accordingly. In *re Villar, Public Trustee v. Villar*(j) is another typical case. In this case the testator tied up his property during a "period of restriction" defined as "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who shall be living at the time of my death" for "all my issue for the time being living who shall not have any ancestor (being issue of mine) living." The trustees were directed during the period of restriction to divide the income equally *per stirpes* among the participating issue, children of a dead participant were to take their parent's share. From and after the expiration of the period of restriction the trustees were to hold the corpus upon trust
.....for the participating issue living at the expiration of the period of restriction in proportion of their previous shares of the income. The will was dated 14th June 1921. The testator died on 6th September 1926. In 1922 there were about 120 descendants of Queen Victoria partly in the United Kingdom and partly on the Continent, and it was apprehended that very great trouble and expense would be incurred in ascertaining the descendants living on 6th September 1926 and an almost prohibitive trouble and expense in keeping track of these persons to ascertain the death of the last survivor possibly eighty years thence. On a summons for determination whether the trusts of income and corpus were void for uncertainty it was held that there was nothing contrary to law and the trusts were valid.

The additional period of twenty-one years allowed by the English rule is the period of 21 years in gross without reference to the infancy of any person as under sec. 114. It may be denoted by the minority of any person who may be the person in whom the interest is to vest or may be any other person whether taking an interest or not. Thus under the English rule vesting may take place when the unborn child of a living person attains majority(k); and the period prescribed by a will may extend until the youngest grandchild of the testator attains twenty-one(l). (Halsbury's Laws of England, Vol. 25, p. 96, paragraph 182). Under sec. 114 this obviously cannot be done, as the person who is to take the ultimate remainder must be the person *at the expiration of whose minority* the ultimate remainder is to vest.

Calculation of Period.

The period under this Act is 18 years. In *Soundarajan v. Natarajan*(m) it was attempted to be argued that under the Indian Majority Act the age is 21 if a

(i) 11 Ves. 112.

(j) (1928) W. N. 251.

(k) *Packer v. Scott*, (1864) 33 Beav. 511.

(l) *Shaw v. Rhodes*, (1836) 1 My and Cr. 135

affirmed 5 C. L. & Fin. 114.

(m) 28 Bom. L. R. 204 (P. C.); 44 Mad. 446
in appeal 48 Mad. 906 (P. C.).

guardian of the minor was appointed. In that case the testator by his will directed the trustees to divide the residue into three equal parts and to pay the income to his three daughters for life and after the death of each daughter in trust for the children of each of the daughters who would attain the age of 21; it was argued that some of the children might have guardians appointed when the daughters died. But that argument was negatived and their Lordships of the Privy Council held that at the testator's death the provisions of the will fixing 21 years as the age of vesting contravened sec. 101 of the Act of 1865 (sec. 114 of this Act) and the whole gift was invalid under sec. 102 of the Act of 1865 as it then stood and that after the life estates of the daughters (which had come to an end) there was an intestacy. The period is to be calculated at the inception when the bequest comes into existence, *viz.*, the death of the testator and the bequest was held to be void. Thus there are two differences between the English law and Indian law :

(a) The age-limit is 18 years and 9 months where gestation actually exists under Indian law ; under English law it is 21 years and nine months.

(b) The period is life in being and the minority of the person to whom the thing bequeathed is to belong according to Indian law. According to English law 21 years in gross are allowed without reference to the infancy of any person.

The period from which time begins to run is when the limitations are created, *i.e.*, in the case of deeds from their dates and in case of wills from the death of the testator. If the limitation begins within the perpetuity period it is not necessary that it should terminate within the same limits. In *In re Curryer's Will Trusts*(n) the period of distribution fixed was the death "of my last surviving child or the death of the last surviving widow or widower of my children as the case may be whichever event shall last happen" when the trustees were to divide the corpus amongst the grandchildren living at such period of distribution and the issue then living of such grandchildren dying before that period as tenants-in-common *per stirpes* "the share of the grandchildren being males to be paid at 21 or being females at that age or marriage," it was held that the rule against perpetuity was not infringed.

Its Application.

The rule against perpetuities applies to moveable as well as to immoveable property(o). The rule does not apply to vested remainders. It applies to contingent remainders, both legal and equitable and to executory devises. A remainder is said to be vested when it is ready to take effect on the determination of the prior estate, *e.g.*, if a devise is made to A for life and after his death to B. B has a vested remainder ready to take effect on the death of A and if B dies in A's lifetime his legal representatives will take. Obviously the rule against perpetuity cannot have any application to a devise of this kind for there is no postponement. If, however, a devise is made to A for life with remainder to such son of B as shall first attain 18 the limitation to the son of B is a contingent remainder and is valid as the period is not exceeded. But if a devise be made to A a bachelor for life and after his death to his first son for life and after the son's death to A's eldest daughter who shall then be living; the contingent remainder to A's eldest daughter living at his son's death is void because it could not vest till the son's death which might occur more than twenty-one years after the death of A. An executory devise is a future interest which is indestructible and unlike contingent remainder it does not depend upon the termination of any prior interest. Executory interests created by will are called executory devises, *e.g.*, a man by his will devises his land to his son A an infant

(n) (1938) W. N. 282.

(o) *Colgan v. Adm.-General of Madras*, 15

Mad. 424; *Cawasji N. Pochkhanwalla v. R. D. Sethna*, 20 Bom. 511.

and his heirs but in case A should die under 21 then to B and his heirs. Here A has an estate in fee subject to an executory interest in favour of B. If A does not die under age B takes nothing but if A dies under age B's estate immediately arises and displaces the estate of A and his heirs. A contingent remainder may become an executory devise, *e.g.*, taking the illustration already quoted if a devise is made to A for life then to the son of B as shall first attain 18, if A survives the testator the limitation to the son of B is a contingent remainder but if A dies in the lifetime of the testator the interest to B's son is an executory devise. In both these cases, *i.e.*, in the case of a contingent remainder or an executory devise if the vesting is delayed beyond the period the gift is void(*p*). There are two further limitations to be observed in case of contingent remainders and they are popularly known as the rule against "Double Possibility" or "Possibility on a Possibility."

Rule II.—Rule in *Whitby v. Mitchell*(*g*).—"An estate cannot be limited in remainder after an estate given to an unborn person for life to any child of such unborn person." In other words there cannot be a limitation to successive generations of unborn issue. (Halsbury, Vol. 25, p. 162). In this case land was devised to an unborn person for life with remainder to the children of that unborn person and it was held the limitations were void. This rule has been abolished by sec. 161 of the Law of Property Act 1925 (12 & 13 Geo. V., c. 13, sec. 18) provided the rule against perpetuity is not infringed.

Rule III.—Rule in *In re Frost*(*r*).—"That a contingent remainder limited to take effect after a contingent remainder is void unless it must necessarily vest within the period allowed by the rule against perpetuities.

Rule IV.—Limitations, in themselves valid, which follow but are not dependent upon limitations offending the rule against perpetuities are not affected by the invalidity of prior limitations. Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift may never come into existence (see sec. 116). But if the gift is independent of the earlier trust, although intended to be made subject to it then the gift is good. In other words limitations in themselves valid which follow but are not dependent upon the limitations offending the rule against perpetuities, are not affected by the invalidity of the prior limitations(*s*). In *re Canning's Will Trusts* was followed in *In re Coleman, Public Trustee v. Coleman*(*t*). In this case the bequest was to one of the sons of the testator W for life and after his death to any widow whom he may marry for life and after the death of the widow for the children of W at 21 or marriage. It was held that the trust in favour of the widow was void as being a trust in favour of a person not born at the testator's death but the trust in favour of the children was good.

In re Frost(*u*).—In this case a trust was for daughter (a spinster) for life, then for the husband whom she might marry for life and then for her children whom she should appoint and in default of appointment to all her children who should be living at the death of the survivor of her and her husband or should have previously died leaving issue then living in equal shares, and in default of issue to the sons of the testator. Subsequent to the death of the testator the daughter married and died without issue. It was held that the limitations subsequent to the life estate of the daughter's husband infringed the rule of possibility on a possibility and were void for remoteness. Here it was argued and with success that the husband was a possibly unborn person when the testator died and it was therefore

(*p*) *Thomas v. Wilberforce*, 31 Beav. 299; *Jee v. Audley*, 1 Cox. Eq. Ca. 324; *In re Ashford*, (1905) 1 Ch. 535; see also *ills.* to sec. 116.

(*g*) 42 Ch. D. 494, 44 Ch. D. 85,

(*r*) 43 Ch. D. 246.

(*s*) *In re Canning's Will Trusts*, (1936) 1 Ch. 309.

(*t*) (1936) 1 Ch. 528,

(*u*) 43 Ch. D. 246.

a limitation to an unborn person for life followed by a limitation to another unborn person, *viz.*, the children. This case is followed in *Re Ashforth(v)*, and *Whitby v. von Ludeck (w)*.

In *Re Park's Settlement, Foran v. Bruce(x)*.—In this case freehold land was limited to a bachelor for life, then to his wife for life and then to his children. It was held that the limitation was void as infringing the rule against limiting land to an unborn person for life (here the wife) with remainder to the children of such unborn person.

In *Re Bullock's will Trusts, Bullock v. Bullock(y)*, a testator devised the rents and profits of his property to his niece B (a spinster) for life and after her to her husband for life and after the death of both to the children of B at twenty-one and in default of children to the children of S. B married but died without issue. It was held that the gift to the children of B was not void. It was argued successfully that the cases *In re Frost*, and *Park's Settlement* were wrongly decided that the limitation to the children of B was not void as children were predicated of B and not of the husband. It was further held that even if the gift in favour of the children was void the gift to the children of S was good as an alternative and severable gift.

In *Re Garnham, Taylor v. Baker(z)*, the decisions in *Re Frost*, and *Park's Settlement* were not followed and it was held that a devise of real estate in trust for a bachelor or spinster for life with remainder for any wife or husband he or she may marry for life with remainder for his or her children is not void for perpetuity because the class of children is ascertained at the death of the first tenant for life and the interpolation of a life interest to an unascertained person cannot make any difference.

The cases of *Re Bullock & Re Garnham* overrule *Re Park's Settlement* and disapprove much of the language of in *Re Frost*. (See Gray on Perpetuities, 4th Edn., p. 332).

All these cases came up for discussion in the originating summons No. 5008 of 1923 of the Bombay High Court and were considered. The judgment unfortunately has not been reported. It was delivered on 19th January 1925. The case was a construction of a deed of settlement by a Parsi lady before the Transfer of Property Act and was governed by the English law. The Court preferred to follow the later decisions *In re Bullock's Trusts* and *In re Garnham* rather than the case of *Park's Settlement*.

In *In re Coleman, Public Trustee v. Coleman(a)*.—A testator by his will gave a share of the residue to his son W for life and after his death to any widow he might leave for life and after the death of the widow for the children of W at 21 or marriage in equal shares. It was held following *In re Canning's Will Trusts* that the trust in favour of the widow was bad as W might marry a woman not born at the death of the testator but the ultimate trust in favour of the children of W was held to be good being a vested and not a contingent trust or dependent on the void trust. In *In re Curryer's Will Trusts(b)* the testator had combined two events, *viz.*, a gift to a class to be ascertained on the basis of the testator's last surviving child and a gift to a class to be ascertained on the basis of the last surviving widow or widower of the testator's children and it was held that the fact that the testator went to add "as the case may be whichever event shall last happen" did not infringe the rule against perpetuities. The rule to be deduced from these decisions is that a

(v) (1905) 1 Ch. 535.

(w) (1906) 1 Ch. 738.

(x) (1914) 1 Ch. 595.

(y) (1915) 1 Ch. 403.

(z) (1916) 2 Ch. 413.

(a) (1936) 1 Ch. 528.

(b) (1938) 1 Ch. 952; (1938) W. N. 282.

gift to a class to be ascertained on the basis of the testator's last surviving child would not infringe the rule against perpetuities. But a gift for a class to be ascertained on the death of the last surviving widow or widower of the testator's children would infringe the rule against perpetuities since a child might marry a person who was not alive and in being at the testator's death. The same rule would be applied according to sec. 116. In *Putlibai v. Sorabjee*(c), the testator devised his house upon trust to allow his daughter until her death or marriage and all his sons and their respective families including widows to reside therein until the youngest of his grandsons living at the death of the last survivor of his sons should attain the age of 18 years and then for sale and conversion. It was held that during the sons' lives their wives took no independent gift but the gift to the son entitled him to reside there with his wife. As all the sons were alive no question arose as to the title to reside which could be claimed for the widows of the sons and their Lordships refrained from expressing an opinion on the title of the claim of such a widow to reside if any son died. They, however, pointed out that sections 99, 100, 101 (i.e., sections 112, 113, and 114 of the present Act) might give rise to difficulty in the claim of a widow if she survived the son, as it was not clear that the whole of the testator's interest was bequeathed.

Perpetuity and Power.—A power may be void for remoteness if the scope and purpose of it is to create a perpetuity. This may happen if the donee of the power may have to be ascertained at a remote period or if the subject-matter in respect of which the power is to be exercised may not come into existence within the prescribed time, e.g., a power given to the unborn child of a living person is too remote(d) unless it is a general power to appoint by deed. In powers the questions of remoteness are governed by three rules: (1) If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. (2) A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote, i.e., if the exercise of a power is made contingent on the happening of an event which may by possibility happen beyond the limits of the rule the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power(e). According to the decision in *Javerbai v. Kablibai*(f) in construing wills of Hindus conferring power of appointment two limitations must be observed, (i) that the appointee should be a person who was alive at the death of the testator and (ii) that the appointee must be a person ascertained when the event arises on which he is to take. In applying the rule against perpetuities to special powers it is to be remembered that it is the exercise and not the creation of the powers that may or may not infringe the rule. In the case of a general power of appointment the period of calculation is from the date of the exercise of the power but in case of special powers the period is always calculated from the time of the creation of the power and the test to be applied is to put the instrument exercising the power into the instrument creating the power and to see whether the rule is infringed or not. (Halsbury, Vol. 25, p. 152, paragraphs 257 and 260). Thus if A by his will gives a life interest to his son B with power to appoint by will a life estate to any woman he may leave as his widow and to appoint the capital among his children and supposing B by his will appoints a life interest to his widow and appoints the corpus after her death to such of his children as would survive the widow, in such a case if the words were written into the will of A, the father, the gift to children would be void for remoteness because at the death of A it would not have been said with certainty that the corpus would vest in B's children within 18 years after an existing life or lives

(c) 25 Bom. L. R. 1099 (P. C.).

817.

(d) *Wollaston v. King*, (1868) L. R. 8 Eq. 165.

(f) 16 Bom. 492.

(e) *Sivashankara v. Sogobramanta*, 31 Mad.

for B might marry a woman who was not born until after A's death and she might survive B by more than 18 years. But if the life interest is given to C, the widow (who was born in A's lifetime) by name then the gift to the children becomes at once good because at the date when the appointment first takes effect it is certain that the appointees must take absolutely within 18 years after the death of a life in being at the date of the death of the testator, *viz.*, the life of son's widow C. (See Encyclopaedia of Forms, Vol. 15, p. 388)

Examples.

(a) A power given to A and his heirs to appoint to B a person living at the creation of the power is good. But a power given to A to appoint to all his grandchildren who are living twenty-five years after his death is bad. If a bequest is made to A for life with remainder as he shall by will appoint, if A was alive at the time of the creation of power the power given to him is good. But if A was not born at the time of the creation of the power the power given is too remote. (Gray on Perpetuities, 3rd Edn., p. 426).

(b) In exercise of a special power a testator appointed a share of personalty to his two grandchildren (objects of the power) who were not living at the date of the creation of power to pay the income equally for their joint lives and after the death of either of them to the survivor for life and on the death of survivor over. *Held*, that the life interest of the survivor of the objects was a contingent interest and was void as contravening the rule against perpetuities(g).

Charity.

The term "perpetuity" when applied to charity is used in two senses. In its primary sense it is a rule which forbids creation of a permanent inalienable interest in property; in its secondary sense it means a grant or disposition of property whereby the vesting is delayed for a period longer than the life in being and 18 years. All charitable gifts create an inalienable and a permanent interest. Hence charitable bequests are an exception to the rule against perpetuity only in its primary sense. But they are not so when the term perpetuity is used in its secondary sense and if that rule is infringed the gift may be void. The words "no bequest is valid" means a bequest of any kind whether a bequest to an individual or to charity. If the vesting of the fund bequeathed to charity might be delayed beyond the life of some or more persons living at the testator's death the rule is infringed(h). If, however, the bequest to charity is alternative the gift is not affected(i).

Hindu Law and Executory Devise.—The right of a Hindu in Bengal to make a will was recognized in 1856(j) but the extent of the testamentary power of disposition should be according to Hindu law(k). In 1862 the question whether a person in existence at the date of the testator's death might become entitled upon a future contingency to receive an additional bequest arose and it was dealt with by their Lordships of the Privy Council(l). In that case a Hindu in Bengal had by his will given the whole of his estate to his five sons in equal shares but had provided that if any son should die without leaving any son or son's son, his share should not go to the widow or daughter of such son so dying but should go to "such of my sons and my son's sons as shall then be alive." One of the sons having died without male issue his widow claimed his fifth share as his heir. It was held that "the limitation over in favour of the testator's sons was valid as an executory bequest." Next came Tagore's case in 1869(m). That case restricted the testamentary

- (g) *In re Legh's Settlement Trusts*, (1938) 1 Ch. 39.
- (h) *Jones v. Adm.-General*, 46 Cal. 485; *In re Villar, Public Trustee v. Villar*, (1928) W. N. 119 (in appeal p. 252).
- (i) *Adm.-General v. Vithaldas*, 22 Bom. L. R. 1905.

- (j) *Nagabutchmee v. Gopoo Nadaraja*, 6 M. I. A. 309.
- (k) *Sonaton Bysak v. Sreemutty Juggutsoon-dree*, 8 M. I. A. 66.
- (l) *Soorjeemoney Dossee v. Denobundoo Mullick*, 9 M. I. A. 123.
- (m) 4 Beng. L. R. 103.

power of disposition in the following respects: (a) that the gift of a life estate was valid even though made to a son; (b) that the testator cannot create an estate which is unknown to the Hindu law, *e.g.* an estate tail male; and (c) that a gift cannot be made by will to a person not in existence at the time of the testator's death. In *Ram Lal v. Secretary of State*(n) the testator gave his estate to his widow for the interest of a Hindu widow and the reversion to his daughter's daughter and it was observed by their Lordships of the Privy Council that since Soorjeemoney's case and the Tagore case it could not be disputed that a gift by will upon an event which is to happen, if at all, on the close of a life in being to a person in existence and capable of taking under the will at the testator's death was good and valid under the Hindu law. In *Gadadhar Mullick v. The Official Trustee of Bengal*(o) the question considered was whether under Hindu law to support a conditional limitation or executory devise it was necessary to have a prior life estate (see p. 629 of the report) and the conclusions which their Lordships arrived at after considering the above cases is set out at p. 638 as follows:— 'Reviewing the authorities and considering them on principle their Lordships are of opinion that the rule which the Board in Soorjeemoney's case thought necessary to the existence of effective testamentary power and which was explained in the Tagore case with reference to the Hindu law of gift is not restricted by further conditions intended to meet or to placate a theory which regards immediacy of effect as a necessary feature of every disposition of property. In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu law has been greatly influenced by the notion of 'relinquishment in favour of a sentient being' as the basis of a gift and of inheritance but this principle has not, as their Lordships read the previous decisions, been allowed to arrest the development of the Hindu law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequest or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, as has been shown from the judgment of Peacock, C. J., in the Tagore case, is sometimes put by saying that the estate cannot remain in abeyance. 'Thus, it appears that the property in the heir must arise immediately upon the death of the ancestor, in the same manner as the property of the donee arises immediately upon relinquishment by the donor.' (4 Ben. L. R. O. C. J. 103 at 189). And Mr. Mayne says of the author of the Mitakshara 'Apparently, in the view of Vijnanesvara, acceptance was necessary to complete a gift because, according to a Hindu lawyer, property can never be in abeyance. It cannot pass out of one until it is received by another.' (Hindu Law and Usage, 6th Ed., 1900, para 376, page 484). But it must needs be admitted that the rigour of this theory, even if it be not destructive of all future gifts is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the legislature has abrogated it: Hindu Wills Act 1870, Hindu Disposition of Property Act, 1916) to limit the class of persons who are capable of taking under a will, restricting it to persons, who either in fact or in contemplation of law are in existence at the death of the testator. But in their Lordships' judgment it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect on the natural determination of a life estate and may be so limited upon a condition which may never be fulfilled: if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu law to be saved by refusing to recognise a limitation to

(n) 8 I. A. 46. (See also *Kumar Tarakeshor v. Kumar Shohi*, 10 I. A. 51. (o) 37 I. A. 129; 42 Bom. L. R. 621.

take effect upon condition in the future because it lacks 'support' from a particular estate. In this case the testator by his will bequeathed the first moiety of his estate to his son "upon his attaining the age of 21 years and the second moiety" to the male issue "of my son" and in default of male issue then in trust for a fund known as Rupchand Dhur. The son died after having attained 21 years leaving a widow. The Official Trustee as a trustee of Rupchand Dhur Trust sued to recover possession of the second moiety. The question for the Court's consideration was "Is the bequest by a Hindu which follows upon the bequest to persons unborn at the time of the will and who do not come into existence between the date of the will and the date of the death of the testator, void?" It was held that the bequest to Rupchand Dhur Trust was valid.

In *Kashinath v. Chinnaji*(p) the question of a bequest to an adopted son arose. In that case a Hindu testator by his will devised his property to his younger son Mahadeo for life and after his death to his sons in equal shares. "In case he leaves no son behind him my Mukhtiars shall get a son adopted by his wife. . . . and shall give the property to him on his attaining the age of 21 years." Mahadeo died without issue and after his death his widow adopted a son R who was born in the lifetime of the testator. It was argued that the bequest to a son of Mahadev adopted after the death of Mahadeo was good as an executory bequest though his interest did not come into existence immediately on the determination of the prior life interest of Mahadeo but it was held that the possibility of the vesting might be delayed beyond the period allowed by sec. 101 (sec. 114 of this Act) and it was no answer to say that the son adopted was in fact living at the death of the testator and the bequest was, therefore, void.

The Hindu Disposition of Property Act XV of 1916 by sec. 2 enacts that subject to the limitations and provisions specified in the Act, a disposition of property by a Hindu whether by transfer *inter vivos* or by will shall be valid in favour of an unborn person. The limitations in respect of transfer *inter vivos* are those contained in sections 13, 14 and 20 of the Transfer of Property Act and in respect of disposition by will, those contained in sections 100 and 101 of the Indian Succession Act 1865. Sec. 4, provides that where a prior disposition fails on account of the aforesaid limitation any disposition intended to take effect after or on failure of such prior disposition shall also fail. The Hindu Disposition of Property Act applies to the whole of British India, except the province of Madras. Madras Act I of 1914 and Act VIII of 1921 (Hindu Transfers and Bequests Act) contain similar provisions as regards Madras. Act XXI of 1929 (Transfer of Property Amendment Act) amended sec. 3 of the Hindu Disposition of Property Act by substituting for sections 100 and 101 of the Indian Succession Act, 1865, sections 113, 114, 115 and 116 of the Indian Succession Act, 1925. Section 4 of the Hindu Disposition of Property Act is omitted. The Act VIII of 1921 (for Madras) is also similarly amended and the limitations are those contained in sections 113, 114, 115, and 116 of this Act.

The Hindu law of perpetuity is thus brought in conformity with the law of perpetuity as laid down in this Act.

Examples.

(1) A testator directed his executors to divide his residuary estate "when my grandsons may attain their age into five shares (he having five sons) and give away the same to their respective sons that is to say to my grandsons." Held: that the distribution was to take place only after all the sons who might be born to the sons should have attained majority and was invalid under the old sec. 101 and 102(g).

(2) A testator gave the residue of his estate on trust "to pay and divide the same among the children of my brothers A and B to be divided among them in the proportion

(p) 30 Bom. 477.

(q) *Subramania v. P. V. Marugesu*, 17 C. W,

N. 488 (P. C.),

of two parts to sons and one part to daughter and that the share of each son shall be paid to him on his attaining 21 and of each daughter on her attaining that age or marrying previously with benefit of survivorship." A and B both died before the eldest of the son or daughter attained 21 or married. Widow filed the suit for a declaration that the trusts were void under secs. 114 and 115. *Held*: that the legatees took a vested interest subject to be divested on death before the contingency happened, that the period of distribution alone and not the vesting was postponed and the bequests were valid(r).

(3) A Hindu testator by his will declared that "my estate shall remain intact and from the profits thereof there shall be performed the worship of ancestral dieties and that my houses, etc. shall always remain intact and my heirs, sons, sons' sons and great grand sons and so on in succession shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the profits or to divide the same." It was held that the object of the testator was to create a perpetuity which would not be allowed by Hindu law and the bequest was invalid(s).

Bequest to a class some of whom may come under rules in sections 113 and 114.

115. If a bequest is made to a class of persons with regard to some of whom it is in operative by reason of the provisions of section 113 or section 114, such bequest shall be *void in regard to those persons only and not in regard to the whole class.*

Illustrations.

(i) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death, and *in regard to those who do not attain the age of 25 within 18 years after A's death, but is operative in regard to the other children of A.*

(ii) A fund is bequeathed to A for his life, and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in *illustration (i)*. *Although the mention of B, C and D does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children B, C or D, who attain the age of 25 within 18 years after A's death.*

[This is sec. 102 of the Succession Act X of 1865. It is amended as shown in *italics* by sec. 14 of Act XXI of 1929. It applies to Hindus, etc., with this addition that the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural-born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III, Cl. 5.]

This section before it was amended by the Act XXI of 1929 reproduced the principle laid down in *Leake v. Robinson*(t), in which the bequest was to A for life and after his decease to the children of A who being a son should attain the age of 25 or being a daughter attained that age or married with consent and in default to the brothers and sisters of A upon their attaining twenty-five or marriages respectively. Five of the brothers and sisters of A were born before the testator's death and it was contended that the bequest though void as to those after born was good as to them; but it was held that the bequest failed in its entirety. "The bequests in question are not made to individuals but to classes and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals." Illustration (i) as it originally stood was adopted from this decision.

Hindus.—The section as originally enacted was applied to the wills of Hindus governed by the Hindu Will's Act but it worked a great hardship and frustrated the

(r) *Maseyk v. Fergusson*, 4 Cal. 670.

11 Cal. 684 (P. C.).

(s) *Shookmoy Chandra v. Manohari Dass*,

(t) (1817) 2 Mer. 363,

intention of the testator. In *Sooudara Rajan v. Natarajan*(u) their Lordships of the Privy Council observed that the validity of the gift must be scrutinised as at the death of the testator. The bequest in that case was to the daughters for life and after the death of each daughter to hold the share of each daughter for her children who would attain the age of 21. Some of the children of the daughter were born in the testator's lifetime. It was accordingly held that if a bequest was made to a class with regard to some of whom it was inoperative by reason of the rule contained in sec. 101 (sec. 114) then the bequest under sec. 102 (as it then stood—present sec. 115) was wholly void as the provisions of the will fixing the age 21 instead of 18 as the age of vesting was in contravention of sec. 101. The whole gift after the life interest of the daughters was invalid under sec. 102. Now by virtue of the amendment of this section this decision is no longer good law so far as it lays down that the whole bequest is void. In cases of wills not governed by the Hindu Will's Act the decision in *Leake v. Robinson* was not applied strictly in construing the wills of Hindus. The earliest case is *Soudaminy v. Jogesh Chunder Dutt*(v) in which *Leake v. Robinson* was followed. But in *Rai Bishen Chand v. Mussumat Asmaida Koer*(w), it was not followed; there the gift was to the children of U, some of whom were born at the date of the gift and others not; and their Lordships of the Privy Council held that those who were in existence at the date of the gift took. In *Ram Lal v. Kanai Lal*(x) the above Privy Council case was followed and it was held that if the intention of the donor is to give a gift to two named persons capable of taking although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should be given effect to notwithstanding that the intention of the donor cannot be carried out in its entirety. Similar decisions were given in *Mangaldas v. Tribhuvandas*(y), and *Bhagabati v. Kalicharan*(z). In all these cases the Court tried to ascertain the intention of the testator and if the Court came to the conclusion that the testator had the primary intention of benefitting all the members of a class and if such intention failed by reason of its being void, yet if the Court could deduce a secondary intention, that at least such members of the class should take as were in existence at the time of the testator's death, then effect was given to such secondary intention.

Legislative effect is now given to these decisions by the amendment of the section by the Act of 1929. The bequest to the class shall not be wholly void, but it will be void only against those members of the class who by reason of the provisions of section 113 or 114 are incapable of taking.

Similar change is also made in the Transfer of Property Act, sec. 15.

116. Where by reason of any of the rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.

Illustrations.

(i) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

(u) 48 Mad. 903
(v) 2 Cal. 262.
(w) 11 I. A. 164.

(x) 12 Cal. 663.
(y) 15 Bom. 652.
(z) 32 Cal. 992 (in appeal 38 Cal. 468).

(ii) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 114. The bequest to B is void.

[This is sec. 103 of the Succession Act X of 1865 as amended by Act XXI of 1929. It applies to Hindus, etc. with this addition that the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children whether adopted or natural-born of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. See Schedule III, cl. 5.]

This section has been substituted by the Act XXI of 1929. Similar amendments are made in section 16 of the Transfer of Property Act. It is a rule against double possibility.

This section incorporates the rule of English law, *viz.*, that "limitations upon void limitations are themselves void," the transaction being one and indivisible the failure of the prior bequest for *any of the rules against perpetuities* leads to the failure of the whole of the subsequent limitation. This rule applies although the subsequent limitation is to a person *in esse* who would otherwise take a vested interest. In order, however, to make the subsequent bequest void on the failure of an antecedent bequest under this section the essential requisite is that both the bequests must be created by the *same transaction*, *e.g.*, a fund is bequeathed to A for life and after his death to such of his sons as shall first attain the age of 25 and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to A for life is valid but the bequest to the sons of A is void (sec. 114) and therefore also the bequest to B is void. The result is that after A's life interest the fund will fall into the residue, and if it is a part of the residue itself, it will go as undisposed of.

This section lays down the effect on *subsequent* limitations and not *prior* limitation. The prior limitation is not affected, and it will take effect as if the void limitation and all limitations dependent upon it were omitted. If a gift over is void the limitation prior to it and made defeasible by it becomes free and may become indefeasible, (Halsbury's Laws of England, Vol. 25, page 145, paragraphs 244-247). The section enacts that the subsequent bequest shall be void only if it is contained in the same will and is intended to take effect after or on failure of such prior bequest. The section does not apply if the subsequent interest is not dependent on the prior bequest, *e.g.*, if a bequest is made to the testator's son W for life and after his death to any widow whom he may marry for life and after the death of the widow for the children of W at 18, the bequest in favour of the widow is void as being a gift in favour of a person not born at the testator's death but the bequest to the children of W is good⁽²⁾

In *Javerbai v. Kablibai*(a), U by his will bequeathed his property to his wife and his brother J for life and after the death of survivor to the male issue of J and in default to such person as J may appoint. The bequest to the male issue of J was void as J had no male issue and J exercised the power in favour of his daughter. It was held that the power of appointment was an independent gift and therefore valid.

117. (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter

Effect of direction for accumulation.

(2) *Public Trustee v. Coleman*, (1936) 1 Ch. (a) 16 Bom. 492.
528.

provided be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

- (i) the payment of the debts of the testator or any other person taking any interest under the will, or
- (ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interests under the will, or
- (iii) the preservation or maintenance of any property bequeathed;

and such direction may be made accordingly.

[This section was substituted for the original section 117 by Act XXI of 1929 and applies to Hindus, etc., as by section 14 of the same Act, in Schedule III, sec. 117 is inserted.]

Under sec. 104 of the Act of 1865 a direction in a will to accumulate the income of a property was void except only for one year from the testator's death in the case of immoveable property and also in respect of other property. When this Act was enacted in 1925 the section was not changed but when the Transfer of Property Act was amended by the Transfer of Property (Amendment) supplementary Act, 1929 (Act XXI of 1929) this section was amended in its present form by sec. 14 of that Act. Originally the section did not apply to Hindus but by sec. 14, the figure '117' was added in Schedule III of this Act and the section is made applicable to Hindus, etc. Similar change is also made in the Transfer of Property Act. sec. 17.

This section prior to its amendment owed its origin to the English Statute known as the *Thellusson Act* (Statute 39 and 40 Geo. III c. 98) which was occasioned by the extraordinary will of Mr. Thellusson who directed the income of his property to be accumulated during the lives of all his children, grandchildren, and great-grandchildren who were living at his death for the benefit of some future descendants to be living at the decease of the survivor, thus keeping strictly within the rule against perpetuities. The Thellusson Act was passed to prevent the repetition of such cruel absurdity. It forbids the accumulation of income for any longer term than (1) the life of the grantor or settlor or (2) 21 years from the death of such grantor or testator or (3) during the minority of any person living or *en ventre sa mere* at the death of the grantor or testator or (4) during the minority only of any person who under the settlement or will would for the time being, if of full age, be entitled to the income directed to be accumulated. But the English law on the subject of accumulation is changed by the Accumulation Act of 1892 and by sec. 166 of the Law of Property Act, 1925 (15 Geo. 5 Ch. 20.)

Sec. 117 as originally enacted was a considerable restriction upon the English law as to accumulation. It prohibited a direction for accumulation except in the following three cases only:—

- (1) Where the property is immoveable the accumulation shall be valid for one year after the testator's death.

(2) Where the accumulation is directed to be made from the death of the testator the direction shall be valid for one year.

(3) Where the accumulation is directed during the minority of a person to whom the bequest is to belong on attaining majority, such a direction shall be valid. This was in accordance with the fourth rule in the Thellusson Act. But if the accumulation was directed beyond the age of majority, *e.g.*, until the legatee attains the age of 30 the direction would be void(b).

Law of Accumulation:—For the purpose of accumulation the first rule to be observed is that provision for accumulations in wills are subject to the rule against perpetuities and must, therefore, be so limited that the accumulations must necessarily come to an end or be determinable on the beneficiaries attaining vested interests within the perpetuity period. Under this section the period of 18 years from the death of the testator is fixed. The statutory period is extended from one year to 18 years and the distinction between moveable and immoveable property is abrogated. The words used are “any property”. If the direction in the will for accumulation exceeds 18 years, the direction is not altogether void but is void to the extent of the period which exceeds 18 years, *i.e.*, if the direction is to accumulate for 25 years it will be void to the extent of seven years. The accumulations during the period may be either at simple or compound interest, (Halsbury, Vol. 25, p. 176). At the end of the statutory period of 18 years, both the property and the income will become payable as per directions in the will. If at the end of that period the person entitled is a minor there may be a further period of accumulation during his minority. No particular words are necessary to constitute a direction to accumulate. It may be either express or implied from the form or nature of the bequest.

Exception.—(a) Payment of debts of testator or of any Person taking interest under Will.—A direction in a will for accumulation for the purposes of payment of the debts of the testator or of any other person taking an interest in the will is valid. This is valid even if the period exceeds 18 years. The provision must be *bona fide* for the payment of debts. The debts may be either existing debts or contingent liabilities to arise in the future. The debts may be either of the testator or of a stranger. The debts may be a mortgage debt either existing at the testator's death or made pursuant to his will. The direction for accumulation comes to an end when the debt is paid or discharged. If the debts are paid otherwise than under the trust for accumulation, the right of the beneficiary to have the estate administered and the accumulation continued so as to recoup him must be confined to proper period, (Halsbury, Vol. 25, p. 176).

(b) Portion for Children:—This exception relates to the provision for raising portions for any child, children or remoter issue of the testator or any child, children, or remoter issue of a person taking interest under the will. By the expression “portions for children” it is generally understood to be sums of money secured to them out of property springing from or settled upon their parents, (Ingpen on Executors, p. 501, 2nd Edn.). A portion strictly so called is a provision for younger children in a strict settlement. Under this section it includes all children. The use of the word “portion” in describing the children's interests is immaterial. The children for whom this provision by means of accumulation may be made may be children living at the death of the testator or born afterwards. If the bequest is to children both of capital and income and there is nothing in the will to impress upon the gift the character of a portion it cannot be called a portion

(b) *Gosai Shingar v. Rivett Carnac*, 13 Bom. 463; *Putlibhai v. Sorabji*, 25 Bom. L. R. 1099 (P. C.).

in the ordinary sense of the word. The property or the fund out of which the portion is directed for accumulation must be settled on the parents. A trust for the parent for life and at his death for his children is also not a portion, although the eldest son is excluded. The interest which must be taken by a parent in order to make a provision for a portion for his children under this exception may be any interest however small, (Halsbury, Vol. 25, p. 178).

The portion need not be created by the instrument directing the accumulation. (For form of will charging property for payment of portion see Form No. 24 Encyclopaedia of Forms Vol. 15.)

(c) **Preservation of Property.**—The third exception to the statutory period is when the direction for accumulation is for the purpose of preserving or maintaining houses and tenements. A trust to keep the property to its present value is valid though unrestricted in time in so far as it is a *bona fide* provision for that object. Similarly a direction to accumulate a part of the rents as a sinking fund for the maintenance and repairs of the property is valid. Trusts to effect improvements generally come under the heading of maintaining in good repairs a tenement(c).

(d) The provisions of this section applies to charity(c¹).

Accumulation according to Hindu Law.—By Act XXI of 1921 this section is made applicable to Hindus. Therefore the law governing Hindu wills as regards accumulation is as laid down in this section. According to strict Hindu law a direction to accumulate is not *per se* illegal(d) and such a direction will be given effect to if it is not void as against public policy, nor given for illegal object nor otherwise inconsistent with Hindu law(e). But in order to support a direction to accumulate under Hindu law there must be a present gift of the property(f). In *Amrito's* case it was held that if there was no beneficial interest created in the property a mere direction to accumulate for an indefinite period is not legal. This case went in appeal to the Privy Council but on another point(g). In *Nafar Chandra v. Ratan Mala*(h) a testator directed his executor to accumulate the income for the marriage expenses of an unmarried son and to give the property to the wife of the son if he married within ten years and failing that to sell the property and apply the sale proceeds for certain religious purposes. The son married within ten years a lady born before the testator's death. Held: that the direction to accumulate was valid. In *Jammabai v. Dharsey*(i) it was held that a direction by a Hindu in his will to accumulate the income till the boy to be adopted attained the age of 16 years was not a direction to accumulate it for ever and could not be treated as infringing the law as to perpetuities. In *Ram Lal v. Bidhumukhi*(j) R by his will gave his property to his widow for life and thereafter to his five sons in equal shares with a direction to accumulate the surplus income during the lifetime of the widow for the benefit of the sons. It was held that the provision for accumulation was not bad. In *Watkins v. Administrator-General*, Sir Lawrence Jenkins said that a direction to accumulate with a gift of the accumulation will not be fundamentally bad; it would only fail if it offended some independent rule of Hindu law. But a direction to accumulate for the purpose of postponing the payment or enjoyment of an absolute bequest is void(k).

(c) *Vine v. Raleigh*, (1891) 2 Ch. 18.

(c¹) *In re Knapp, Spreckley v. Att.-General*, (1929) 1 Ch. 341; (1929) W. N. 322.

(d) *Krishnarao v. Benabai*, 20 Bom. 571.

(e) *Rajendra v. Raj Coomari*, 34 Cal. 5.

(f) *Amrito v. Surnomoyi*, 24 Cal. 589; (in appeal 25 Cal. 662).

(g) 27 I. A. 128. (See also *Benode Behari v. Nistarini*, 33 Cal. 180 (P. C.).

(h) 15 C. W. N. 66.

(i) 4 Bom. L. R. 893.

(j) 47 Cal. 76. (See also *Watkins v. Adm.-General*, 47 Cal. 88.

(k) *Cally Nath v. Chunder Nath*, 8 Cal. 377.

118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required —

- for the relief of poor people ;
- for the maintenance of sick soldiers ;
- for the erection or support of a hospital ;
- for the education and preferment of orphans ;
- for the support of scholars ;
- for the erection or support of a school ;
- for the building and repairs of a bridge ;
- for the making of roads ;
- for the erection or support of a church ;
- for the repairs of a church ;
- for the benefit of ministers of religion ;
- for the formation or support of a public garden ;

All these bequests are void.

[*This is sec. 105 of the Succession Act X of 1865.*]

This section does not apply to Hindus or Mahomedans. It applies to Parsis and to all others governed by this Act. At the time when the Bill was passed an attempt was made to exclude the Parsis from the operation of this section as the Parsis were not under the influence of priestly class, but the attempt failed. This section applies to all the bequests to charities, whether such bequest is a direct bequest or is a contingent bequest or is subject to a life interest (see Ill. to sec. 87). In *Bai Cursetbai v. Bai Hamabai*(1) a testatrix by her will bequeathed Rs. 25,000 on trust to pay the income thereof to her son A for life and as to the principal it was to be given to such person as A by his will may appoint, and in default of such appointment the testatrix by her will directed that Rs. 5,000 should be spent for some charity for the benefit of the Parsis and the rest to be distributed amongst the widow and children of A. When the testatrix died A was alive and her nephew J was also alive. The will was deposited with the Sub-Registrar within six months of its execution but it was not executed 12 months before the death of the testatrix. When A died he left no widow or children and he did not exercise the power of appointment given to him by the testatrix. In a summons for direction whether the bequest to charity was void, Kania, J., held that section 118 applied only to direct charitable bequest and not to an indirect bequest of this kind and the bequest was not void but on appeal the decision was reversed and as one of the conditions laid down in this section was not complied with, the bequest was void and the corpus of Rs. 25,000 less Rs. 5,000 for Kirya Kam fell into the residue.

Deposit of Wills.—The procedure for deposit of wills is laid down in Part IX, secs. 42 to 46 of the Indian Registration Act XVI of 1908. Section 42 provides that any testator may, either personally or by duly authorised agent, deposit his will with the Registrar in a sealed cover superscribed with the name of the

testator and that of his agent (if any) and with a statement of the nature of the document, *viz.*, whether it is a will or a codicil. Under sec. 43 on the receipt of the cover, the Registrar, if satisfied, that the person presenting the same is the testator or his agent, shall transcribe in his Register-book No. 5 the superscription of the cover and shall note in the same book and on the same cover the year, month, day, and hour of such presentation and receipt and the names of any persons indentifying the identity of the testator or his agent and any legible inscription which may be on seal of the cover and the Registrar shall then place and retain the sealed cover in his fire-proof box. The Registrar does not open the cover to ascertain the nature of the document. Sec. 45 provides that on the death of the testator and on the production of the death certificate or proof of death, on an application being made the Registrar shall, in the applicant's presence, open the sealed cover and at the applicant's expense cause the contents thereof to be copied into his Book No. 3 and after the copy is made the Registrar shall re-deposit the original will. When the application for Probate is to be made, on an order being served on the Registrar by the Court, he shall produce the will to the Court and make a note to the effect in his book No. 3 as provided by sec. 6.

Withdrawal of the sealed Packet.—Sec. 44 of the Registration Act provides that if the testator who has deposited the sealed packet wishes to withdraw it he may apply either personally or by duly authorised agent to the Registrar who holds it in deposit and the Registrar, if satisfied, that the applicant is actually the testator or his agent shall deliver the cover to him. Sec. 118 of the Succession Act is silent as to the effect of the withdrawal of the will from the Registry. Under sec. 48 of the Registration Act of 1864 the testator had to seek the permission of the Court to withdraw his will from the deposit but there is no such provision under the Registration Act XVI of 1908. Section 118 also merely mentions that the will shall be deposited within six months of its execution but does not say how long it should remain deposited. In *Mariano v. Rt. Rev. F. Provost*(*m*), it was held that to satisfy the requirements of sec. 118 and to validate a charitable bequest the will must remain deposited *until the death of the testator*. In this case the sealed packet containing the will and codicil had remained deposited with the Registrar for over six years but shortly before his death the testator had asked his lawyer to withdraw the packet and he withdrew it and gave it to the testator who kept it with him for a few days and gave the packet back to his lawyer without opening it and it remained with the lawyer till the testator died. After the death of the testator the lawyer opened the packet in the presence of the members of the testator's family and probate was obtained. For some time the executrix carried out the charity but subsequently stopped it and thereupon Bishop Rev. Provost filed a suit against the executrix and it was held that the true construction of sec. 118 was that the will must remain in deposit until the death of the testator, that by withdrawing the will the testator had divested himself of the power to make a bequest to religious or charitable uses and therefore the bequest failed. There is no time limit for depositing a will. (See sec. 27).

Registration of wills.—Registration of wills is different from deposit of wills. Registration of wills is provided by secs. 40 and 41 of the Registration Act. A will may be presented for registration (*a*) by the testator or (*b*) after his death by any person claiming as executor or otherwise under a will. There is no time limit for presentation of the will for registration. (See sec. 27 of the Registration Act.)

Effect of Registration.—Mere registration of wills is not proof of the testamentary capacity. The will must be proved in the ordinary way(*n*). In several

(*m*) (1941) Rang. 410; A. I. R. (1941) R. 305.
(*n*) *Sadaeshi Ammal v. Rajathi Anemal*, A. I.

R. (1940) M. 315.

cases the Courts have declined to uphold even registered wills(o). The scope of inquiry before the Registrar who registers the will in the testator's lifetime does not always comprise all the ingredients which the Court considers material when called upon to determine a question of testamentary capacity. When the testator himself appears and he admits execution, the requirements of the Registration Act are satisfied, and the only inquiry by the Registrar under secs. 34 and 35 of the Registration Act is as to the identity of the person appearing before him. An inquiry as to the capacity of the testator becomes necessary if the executant appears to the Registrar to be a minor or an idiot or lunatic(p).

ENGLISH LAW AS TO CHARITY

The word "charity" has not been defined in any of the Statutes and is incapable of definition. In the Preamble to the Statute of Elizabeth (43 Eliz. c. 4) the objects enumerated are:—"relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning and free schools and scholars in universities, repair of bridges, ports, havens causeways, churches, sea-banks and highways, education and preferment of orphans, relief or maintenance of house of correction; marriages of poor maids, support, alms aid and help of young tradesman, handicrafts-men, and persons decayed, relief and redemption of prisoners or captives, aid or ease of any poor inhabitants, concerning payment of fifteenes, settinge out of soldiers and other taxes. This Statute was repealed, except as to Preamble by Mortmain and Charitable Uses Act, 1888, (51 and 52 Vict. C 42) which is still in force. Under this Statute every assurance of immoveable property for any charitable uses is void unless executed before two witnesses twelve months at least before the donor's death and enrolled in Chancery within 6 months before the death. The deed must take effect in possession. It must not reserve any interest to the grantor. According to the classification by Sir Samuel Romilly in *Morice v. The Bishop of Durham*(q) charity in its legal sense should comprise (1) trust for the relief of poverty, (2) trusts for the advancement of education, (3) trusts for the advancement of religion and (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads. Within one of these divisions all charity to be administered by the Court must fall.

To satisfy the requirements of law the following requisites must be complied with in order that the gift to charity may be valid, (1) the purpose of the charity must be of a public character, *i.e.*, it must be for the benefit of the community or a section of the community, (2) the charitable intention must be clearly expressed, (3) the application of the fund for the charitable purposes must be obligatory, (4) the amount of gift in favour of charity must be ascertainable and (5) the object of the charity must be lawful.

It follows, therefore, that a trust for charity generally or a trust for charitable purpose to be determined by the trustees are good trusts(r) for such a trust will not fail for the want of certainty or by reason of indefiniteness and will be applied *cy-pres*. In this respect a public charitable trust defers from a private charitable trust. In a private charity if the objects fail, the trust fails, but a public charitable trust will never fail for uncertainty of objects, (Snell's Equity, 21st Edn., p. 102).

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| <p>(o) <i>Shunmugaraya v. Mannikka</i>, 32 Mad. 400 (P. C.); <i>Vellawamy v. Sitaraman</i>, 8 Rang. 179 (P. C.); <i>Surendra Nath v. Jnanendra Nath</i>, A. I. R. (1932) C. 574; <i>Brajeswari Dassi v. Rasik Chandra</i>, A. I. R. (1925) C. 739.</p> | <p>(p) <i>Sadachi Ammal v. Rajathi Ammal</i>, A. I. R. (1940) M. 815.
(q) 10 Ves. 522 (see also <i>Commissioner of Income Tax v. Pemsell</i>, (1891) A. C. 581.
(r) <i>Moggridge v. Thacwell</i>, 7 Ves. 36; <i>Mills v. Farmer</i> 19 Ves. 486.</p> |
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But if the charitable institution mentioned in the will is defunct before the testator's death or is non-existent the gift lapses(s).

PUBLIC AND PRIVATE CHARITIES

As stated in Tudor on Charities, 5th Edn., p. 11, "law recognises no purpose as charitable unless it is of a public character. That is to say a purpose must in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine". Lord Wrenbury observes: "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot"(t). No definition of what is meant by a section of the public has been laid down(u). Lord Greener M. R. who delivered judgment concludes by saying that "on principle a gift under which beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity" (see p. 131 of the report). In *Ommaney v. Butcher*(v) it was held that a direction to distribute "in private charity" did not constitute a charitable trust. But the use of the word "private" is not by itself sufficient to indicate that the charity is necessarily private(w). On this ground a trust for "poor relations" will fail if it is confined to the next-of-kin(x).

INDIAN LAW AS TO CHARITY

Indian law only recognises public charities. Sec. 118 is based on the Statute of Mortmain (9 Geo II c. 36). Although it was held in *Mayor of Lyons v. East India Co.*(y) that this Statute has no application in India, the words used in this section are "religious uses or charitable uses" and the illustrations are adopted from the enumerations of objects mentioned in the Statute of Elizabeth (43 Eliz. c. 4) and the provisions as to the execution of wills one year before and the deposit of the wills for a period of six months in the registry are also borrowed from the English law mentioned above. Under section 18 of the Transfer of Property Act IV of 1882 the classification of Sir Samuel Romilly in *Morice v. Bishop of Durham*(z) has been adopted, viz., advancement of (1) religion, (2) knowledge, (3) commerce, health and safety and (4) any other object beneficial to mankind. Under sec. 4(3) of the Indian Income Tax Act XI of 1922 charitable purposes include relief of the poor, education, medical relief and advancement of any other objects of general public utility. In the Charitable Endowments Act VI of 1890 it is enacted that charitable purposes "include relief of the poor, education, medical relief and the advancement of any other objects of general public utility but does not include a purpose which relates exclusively to religious teaching or worship. In sec. 92 of the Code of Civil Procedure the words used are "public purposes of a charitable or religious nature".

- (s) *In re Tharp, Longrigg v. Peoples Dispensary for Sick Animals*, All E. R. 5th September 1942; *Malchus v. Broughton*, 11 Cal. 591, (in Appeal 13 Cal. 193).
 (t) *Verge v. Somerville*, (1924) A. C. 496 at p. 499.
 (u) *In re Compton*, (1945) 1 Ch. 123 at p. 129.

- (v) (1823) T. & R. 260.
 (w) *Re Sinclair's Trust*, (1884) 13 L. R. Tr 150; *Att.-General v. Pearce*, 2 Atk. 87.
 (x) *Edge v. Salisbury*, (1749) Amb. 70.
 (y) 1 M. L. A. 175.
 (z) 9 Ves. 399, 10 Ves. 522.

CONDITIONS FOR VALID CHARITABLE BEQUEST

For the purpose of creating a valid charitable bequest by will the conditions laid down by sec. 118 are that a man having a nephew or a niece or nearer relations, *i.e.*, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister, shall not make a will or a provision in the will for religious uses or for charitable uses unless the will shall have been made not less than twelve months before his death and has deposited it within six months from its execution in the Registrar's office.—Three conditions must be satisfied (1) the will must be executed in the manner provided by sec. 63, (2) the will must be deposited with the Registrar within six months of its execution and must remain so deposited until the death of the testator, and (3) the testator must live for a period of twelve months after the execution of the will. The object of the section is to prohibit death-bed bequest to religious or charitable uses by persons having near relations.

As regards the widow of the testator whether she is a "nearer relative" within the meaning of this section the Madras High Court has held that under this section a widow is not a nearer relation and that the bequest to charity by a person who died two days after the making of the will leaving a widow was valid, on the ground that this section had no application to any relationship by marriage(a). On the other hand the Bombay High Court has in O. S. No. 997 of 1917 (*Dinbai v. Pestonjee*) held that the widow is included in the term "nearer relative."

ADVANCEMENT OF RELIGION

Religious uses may be public religious uses such as public temples, churches, or private uses such as tomb-stone for the dead relations, or saying of masses for the souls of dead relatives. It is only religious uses which are public that the law recognises as charitable. The expression "religious purposes" means purposes conducive to the advancement of religion. In England a bequest for religious purposes is held to be *prima facie* bequest for charitable purposes(b). Such purpose must tend directly or indirectly to instructions or edifications of the public(c). Hence it follows that a gift to provide for a private temple or minister or Shebait for a private temple and the bequests for prayers or masses for the soul of the testator or for religious ceremonies for his benefit would not be charitable. (see Tudor on Charities, 4th Edn., p. 41).

One distinction to ascertain whether a bequest to religious uses is public or private is to find out whether it is or it is not liable to the payment of income tax. All public trusts are exempt from the payment of income tax but not private trusts, see sec. 4 (3) of the Income Tax Act IX of 1922, which provides that nothing contained in cl. (i) or cl. (ia) or cl. (ii) shall operate to exempt from the provisions of the Act that part of the income of a private religious trust which does not enure for the benefit of the public.

Public religious trusts are for the support or propagation or advancement of religion. As there is nothing like state religion in India all gifts will be upheld as good charitable bequests if the gift is for a religious purpose, and that purpose contains elements of charity and is not of a superstitious nature. Such a purpose need not necessarily be to the whole community or to the whole class of objects. Thus a bequest for "evangelistic works including retired missionaries but only if Protestants and a whole hearted believer in Christ" is a valid religious bequest

(a) *Advocate-General of Madras v. Simpson*, (c) *Cox v. Manners*, 12 Eq. 374; *In re Ward*, 26 Mad. 332. *Public Trustee v. Ward*, (1941) 1 Ch. 303.
(b) *In re White*, (1893) 2 Ch. 41 at p. 52. .

for the advancement of religion(d). A gift to such religious and charitable purposes as the executors may think proper will be upheld(e).

Dharam.—The Judicial Committee in *Ranchordas v. Parvatibai*(f) held that a bequest for “dharam” is void for uncertainty. That decision was given in 1899 and has since been followed by the Courts in India(g). But in 1907 in *Parthasaratty v. Thiru Vengada*(h) Subrahmanya, J., in his dissenting judgment has expressed the view that a bequest for “dharam” is a good bequest according to the meaning of the word given in the Sanskrit texts. His Lordship has observed that the word “Dharam” when used in connection with the gift of property by a Hindu has perfectly well settled meaning and connotes *ishtha* and *poorta* donations. The word is a comprehensive term referring to certain classes of pious gift and is not a mere vague and uncertain expression. In Wilson’s Dictionary the word is interpreted as “law, virtue, legal or moral duty” and the Judicial Committee took this interpretation. For further elucidation of the word “Dharma” see Bal Gangadhar Tilak’s *Gita Rahasya* translated by B. S. Sukthankar, p. 88 et seq. In *Advocate General of Bombay v. Jimbabai*(i) Beaman, J., has expressed as follows:—“It has often been held that gifts to Dharma are void for uncertainty. I have never been able to concur wholeheartedly in the niceties of legal distinction which have led to, and been used in support of, the decisions. In this country “Dharma” does mean roughly and almost invariably in the cases which have come up for legal decisions just “charity” and nothing else. It is true that an Oriental’s idea of charity might be a little wider and looser than that of Lord Eldon, particularly amongst the lower and more illiterate classes of Hindus and Mahomedans; but a liberal use of the convenient doctrine of *Cy-pres* which is surely elastic enough to reach almost anything which Judges wish to reach, might have validated the technical defects and cured the infirmity. The ground of rule in England appears to have been that as all charities were the special care and under the direct control of the Court of Equity that Court must refuse to accept as “charity” any gift which by reason of the vagueness in which it was expressed left the Court in doubt as to how it was to be applied. I should hardly have thought that outside the region of a rather hyper refined legal pedantry such considerations had any substance or real practical weight. But so the law undoubtedly stands, and when testators bequeath funds to ‘dharma’ the Courts decline to validate the gift as a gift to ‘charity’ in the English sense”. But if instead of the word “dharam” the testator uses the English expression “charity” (charity) the bequest will be a valid charitable bequest(j).

It may here be mentioned that to give effect to the popular expression “dharma” a Bill was introduced in the Legislative Assembly being bill No. 10 of 1938 published in the Gazette of India, Part V on 17th September, 1938 at p. 309 but that bill has not been enacted into law. In section 4 of that Bill it is provided that “No bequest, gift, trust or other dispositions whether contained in testamentary writing shall be void on the ground of—

(i) Vagueness or uncertainty of object where some general expression is used indicating that the object is charitable or religious or of public utility or more than one of these, though no particular object of any such nature has been specified. Illustrations of some of the general expressions are “Dharamada”, “Sarakam”, “Good work”, “Purposes of charity” “Purposes of usefulness” “Just and proper acts”, “public benefits”, “good acts”, etc., or

(d) *In re Mylne*, (1941) W. N. 57.

(e) *Baker v. Rutton*, 1 Keen 224.

(f) 23 Bom. 725.

(g) *Raghava v. Lachmi Koer*, A. I. R. (1939) Pat. 686.

(h) 80 Mad. 340.

(i) 41 Bom. 181.

(j) *Chaturbhuj v. Com. of Income Tax*, 48 Bom. L. R. 63 at p. 64.

(ii) On the ground that such bequest, gift or trust or disposition is mixed up with other purposes of a definite or indefinite nature, whether charitable or non-charitable, or religious or of pious utility.

In the cases mentioned in the footnote(k) a bequest to "Dharam" or "Dharmada" was held to be void.

But if the word "dharam" or "dharmada" is used in conjunction with other words denoting a general intention of charity the gift is not void(l). In *Abdul Sakur v. Abubakkar(m)* a bequest for "dharmakriya" by a Cutchi Memon was held valid. But a bequest for "Dharmada Kam" was held to be void for uncertainty(n).

Khairat.—This word has not received a judicial interpretation from their Lordships of the Privy Council. The ordinary meaning of the word is relief of the poor and of the sick. In *Mariambi v. Fatmabai(o)* a bequest for "dharama Khairat vigero" was held to be void for uncertainty. The Allahabad High Court, however, in a recent case(p) after reviewing all the authorities has held that a trust for Khairat or Khairati Kam is a perfectly good trust and Khairat and Khairati Kam should be taken as equivalent to charity and charitable objects and a specification of objects of charity is not necessary.

"Punya Kariya".—This word means pious act. In *Satkarhi v. Hazaril(q)*, the Calcutta High Court has held that a bequest for Punya Kariya was void for uncertainty.

Punya Marge or Punya Danma or Sare Marge:—These words mean "for religious merit". These words were held to be void for uncertainty(r).

"Lokopyogi".—The word means public service. The Bombay High Court held that the words "lokopyogi works" were not charitable and the bequest was void(s).

SUPERSTITIOUS USES

"A superstitious use may be defined generally to be one which has for its object the propagation or the rites of a religion not tolerated by the law", (Boyle on Charities, p. 242). In England the Statute I, Ed. 6 c. 14 (Chantry Act) made certain existing religious trusts void on the ground that they were contrary to the policy of the law. This policy of the law is spoken of as the doctrine of superstitious uses. Of superstitious uses the most important are gifts for prayers or masses for the souls whether of the testator or any other person. From 1559 the mass was an illegal service and it remained so until 1829 when the Catholic Relief Act, 1829, (10 Geo. 4 c. 7) was passed. *West v. Shuttleworth(t)* was only overruled in 1919 by the classic judgment of Lord Birkenhead L. C. (Lord Wrenbury dissenting) in *Bourne v. Keane(u)*. His Lordship has in his exhaustive

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| <p>(k) <i>Lakshmi Shankar v. Vajinath</i>, 6 Bom. 24; <i>Morarjee v. Nenbai</i>, 17 Bom. 351; <i>Deoshankar v. Mctiram</i>, 18 Bom. 136; <i>Gangubai v. Thavar Mulla</i>, 1 B. H. C. R. 71; <i>Cursandas v. Vundratandas</i>, (in appeal <i>Vundratandas v. Cursondas</i>, 21 Bom. 616 and in appeal to (P. C.) <i>Ranchordas v. Paratibai</i>, 23 Bom. 725, 26 I. A. 71; <i>Parhasarathy v. Thiruvengada</i>, 30 Mad. 340; <i>Narandas v. Brij Lal</i>, A. I. R. (1933) L. 833.</p> <p>(l) <i>Vaidyanatha v. Swaminatha</i>, 26 Bom. L. R. 1121; <i>Tulsidas v. Ado. General of Bombay</i>, 39 Bom. L. R. 495.</p> <p>(m) 54 Bom. 358; A. I. R. (1930) B. 191.</p> | <p>(n) <i>Shamtai v. Govardhan</i>, A. I. R. (1925) S. 195.</p> <p>(o) 31 Bom. L. R. 135; (see also <i>Radhey Shyam v. Radhey Lal</i>, 1 Luck. 554; <i>Gauri Shankar v. Mohan Lal</i>, 15 Luck. 674.</p> <p>(p) <i>Muhammad v. Azimuddin</i>, (1941) All. 443 at pp. 458 459.</p> <p>(q) 58 Cal. 1025.</p> <p>(r) <i>Dhyabhai v. Chamanlal</i>, 40 Bom. L. R. 418.</p> <p>(s) <i>Prabhakuberbai v. Kasumababai</i>, (1940) Bom. 761.</p> <p>(t) (1835) 2 My. & K. 684.</p> <p>(u) (1919) A. C. 815.</p> |
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judgment reviewed all the Statutes and case law and has made the following observations (see. p. 831 of the report). "Unwilling as I am to question old decisions, I shall be able, if my view prevails, to reflect that your Lordships will not within a short period of time have pronounced to be valid legacies given for the purpose of denying, some of the fundamental doctrines of the Christian religion, and have held to be invalid a bequest made for the purpose of celebrating the central sacrament in a creed which commands the assent of many millions of our Christian fellow countrymen. In the second place, and in the event supposed, your Lordships will have the satisfaction of deciding that the law of England corresponds upon this important point with the law of Ireland, of our Great Dominions, and of the United States of America." His Lordship's conclusions are summed up at pp. 856-857. He holds that "the celebration of mass, according to Roman Catholic doctrine, is by no means a benefit entirely confined to the soul or souls of the persons for whom it is directly designed; it benefits (such is the conception) the whole of the living community as well as the dead" (see page 833 of the report). "That the current of decisions which held that such uses and trusts are *ipso facto* superstitious and void begins with *West v. Shuttleworth* and is due to be a misunderstanding of the old cases". The Irish Court in *O'Hanlon v. Logue(v)* held that a bequest for masses in perpetuity was a good charitable gift whether there was a direction that the mass should be celebrated in public or private.

Bourne v. Keane only established that absolute gifts* for saying prayers for the repose of the souls of the dead were valid but it did not decide that such gifts were charitable. That point was decided in *In re Caus(w)* 162 where it was held that a gift for saying masses was charitable as being for the advancement of religion (1) because it enables a ritual act to be performed and (2) because it assists in the endowment of priests whose duty it is to perform the act.

Indian Law as to superstitious uses.—In India neither the English law as to superstitious uses nor the Statute of Mortmain is extended. But in *Colgan v. Adm.-General(x)* a bequest for the performance of mass was held to be void. The decision in *Colgan v. Adm.-General of Madras* is based on the English decisions(y) which were decided on the law of superstitious uses. The case of *Andrews v. Joakim(z)* where a gift for saying mass was held to be valid by the Calcutta Court was cited but Collins, C. J., declined to follow the ruling and held that as the bequest infringed the rule against perpetuities the bequest was void. His Lordship has made the following observations in discussing the doctrine of perpetuities: "It is not necessary, however, in the present case to discuss the question whether on general principles gifts for masses for the soul of the donor or those of others should be considered to be for charitable purposes so as to exempt them from the rule against perpetuities. The contrary has been decided in many cases by which we consider we are bound." His Lordship distinguishes the decisions of the High Court of Calcutta on the ground that the rule against perpetuities was not raised in them and that they were decided solely on the ground that the law against gifts for superstitious uses was not applicable to India. It is submitted with respect that having regard to the fact that *West v. Shuttleworth* is overruled, the decision in *Colgan v. Adm.-General of Madras* is no longer good law.

Baj Rojgar and Muktaḍ Trusts.—Akin to the theory of superstitious uses, in the Parsi community trusts have been created for the performance of religious ceremonies called Baj Rojgar and Muktaḍ for the souls of the deceased members

(v) (1906) 1 Ir. Rev. 217.

(w) (1934) 1 Ch. 162.

(x) 15 Mad. 424.

(y) *West v. Shuttleworth*, 2 My. & K. 684 ;
Heath v. Chapman, 7 Ves. 490.

(z) 2 B. L. R. (O. C.) 148.

of the family of the settlers or testators. The Judicial Committee following *West v. Shuttleworth*, has held that a devise of a plantation in which the graves of the testator's family were placed to be reserved as a family burying place and not to be mortgaged or sold was void as a devise in perpetuity(a). It was observed in that case that although the performance of the ceremonies was considered by the Chinese to be a pious duty it was one which did not seem to fall within any definition of a charitable duty or use, that the observance of it did not lead to public advantage and that it could only benefit the family itself. The principles laid down in that decision were held to apply to Parsis(b). Following that decision, trusts for Baj Rojgar created by Parsis were held to be void in several cases until the decision in *Jamshedjee v. Soonabai*(c) Davar, J., however, held that such trusts were not for superstitious uses but for the spiritual welfare of the Zoroastrians and for the advancement of the Zoroastrian religion and for the benefit of all mankind. Under Bombay Act XXIII of 1936 (Parsi Public Trusts Registration Act) such trusts are treated as public charitable trusts and the trustees of such trusts are required to file their accounts in accordance with the provisions of that Act.

Having regard to the amendment made in 1939 in the Indian Income Tax Act such trusts are also exempt from the payment of income tax. By sec. 3(4) of the Indian Income Tax Act XI of 1922 any income profits or gains falling within the following classes shall not be included in the total income :—

- (i) Any income derived from property under trust or other legal obligations wholly for religious or charitable purposes
 - (a) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purpose of the institution and the business is carried on in the course of the primary purpose of the institution, or
 - (b) the work in connection with the business is mainly carried by beneficiaries of the institution.
- (ii) Any income of a religious or charitable institution derived from voluntary contribution and applicable solely to religious or charitable purpose.

This section was amended by the Indian Income Tax (Amendment) Act VII of 1939 whereby it was enacted that in sec. 4 the expression "Charitable purposes", "includes relief of the poor, education, medical relief and advancement of any other object of general public utility but nothing contained in clause (i) sub-clause (ia) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public". It was held in the case of *Commissioner of Income Tax v. Jamal Mahomed*(d) that the expression "Charitable purpose" means only public charity. Leach, C. J., has observed that the amendment to the Income Tax Act by Act VII of 1939 was made in order to put beyond all doubts the intention of the Legislature not to exempt private trusts for religious purposes. The definition of "Charitable purposes" in the Income Tax Act has been taken from the Charitable Endowments Act XI of 1890 sec. 2, where it includes "relief of poor, education, medical relief and the advancement of any object of general public utility but does not include purposes which relate exclusively to religious teaching or worship. The last clause excluding religious worship or teaching is also omitted in the definition in the Income Tax Act. The definition given in the Income Tax Act goes further than the definition of charity to be derived from English Acts because it embraces purposes of general public utility(e).

(a) *Yeap Cheah v. Ong Cheng Neo*, (1875) L. R. 6 (P. C.) 38.

(b) *Limji v. Bapuji Limbwalla*, 11 Bom. 441.

(c) 33 Bom. 122.

(d) (1941) Mad. 863.

(e) *In re Tilak Jubilee Fund*, 43 Bom. L. R. 1027 at p. 1031.

Bequests to Idols.—Sec. 118 does not apply to Hindus and consequently doctrine of superstitious uses has no place in Hindu theology. It was held in *Adv-General v. Vishwanath(f)* and in *Khushalchand v. Mahadevgiri(g)* that the English Statute as to superstitious uses is not applicable to the Courts in India and the doctrine of superstitious uses does not apply in the case of Hindu religious endowments. Under Hindu law an idol is symbolical of religious purposes and is capable of being endowed with property and property can be validly dedicated to an image. The decisions in *Mullick v. Mullick(h)*, *Sonathan Bysack v. Sreemuty Juggotsoondree(i)* and others recognize gifts to idols. They are all cited by Mookerjee, J., in his learned judgment at p. 158 in *Bhupati Nath v. Ramlal(j)*. In *Sonathan Bysack v. Sreemuthy Juggotsoondree* it was held that the bequest to the idols was not an absolute gift to the idol but was a gift to the testator's sons and their offspring in the male line and that after providing for the expenses for the ceremonies of the idol the surplus belonged to the testator's sons. A similar decision was given in *Gopal Lal Seth v. Purna Chandra(k)*.

In all such cases of wills it is only a question of construction whether the bequest is absolute to the idol or otherwise. An idol is regarded under Hindu law as a juridical person capable as such of holding property(l). Hence a gift can be made to an idol as such and no express words of trusts are requisite(m). If the gift is absolute to idol the shobait is the person to take the gift(n). But if the gift is not absolute to the idol the rule is to create a charge on the property in favour of the idol for the necessary income for the performance of the ceremonies pertaining to the idol and to give the residue to the heirs(o). Their Lordships of the Privy Council have held, that in determining whether the will of a Hindu gives the testator's estate to an idol subject to a charge in favour of the heirs or makes the gift to the idol a charge upon the estate, that question is one of construction of the will as a whole, that although the will provides that the property "shall be considered to be the property of the idol still if the residue is to be used by the heirs after defraying the expenses of the ceremonies and if the ceremonies are indicated by the testator and would absorb only a small portion of the income that would indicate that the heirs should take the property subject to the charge for the performance of the religious purposes"(p).

Gift to Idols not in Existence.—Following the decision in *Tagore v. Tagore* that under Hindu law no valid bequest can be made to an unborn person it was held that no valid gift or dedication of property can be made by a will to an idol not established in the lifetime of the testator and not in existence at the testator's death(q). But the Full Bench of the Calcutta High Court has overruled these decisions and held that the principle of Hindu law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void(r). Mookerjee, J., after reviewing all the text of Hindu law sums up as follows:—(i) The view that no valid dedication of property can be made by a will to a deity the image of which is not in existence at the time of death of the testator is based upon a double fiction namely that a Hindu deity is for all purposes a juridical person, and secondly

(f) 1 Bom. H. C. R. (app. IX).

(g) 12 Bom. H. C. R. 214.

(h) Knap. 245.

(i) 8 Moo. I. A. 66.

(j) 37 Cal. 128 (F. B.).

(k) 49 I. A. 100.

(l) *Jagadindra v. Hemanta*, 32 Cal. 129 (P. C.).

(m) *Bhugobutty v. Gooroo Prosonno*, 25 Cal.

112.

(n) *Kali Krishna v. Mahhan Lal*, 50 Cal. 233.

(o) *Ashutosh v. Doorga Churn*, 5 Cal. 438.

(p) *Pande Har Narayan v. Surja Kunwari*, 48 I. A. 143.

(q) *Upendra Lal v. Hem Chandra*, 25 Cal. 405; *Nogendra v. Benoy Krishna*, 30 Cal. 521;

Rajomoyee v. Troyluckho, 6 C. W. N. 267.

(r) *Bhupati Nath v. Ram Lal*, 37 Cal. 128, (B.F.)

that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated and the second is inconsistent with the first principles of Hindu jurisprudence. (ii) The Hindu law recognizes dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste with religious endowments....It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year". In *Chandi Charan v. Haribola(s)*, however, Bhupatinath's case was distinguished and it was held that a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment was to take effect was void for uncertainty.

Jewish Law and Superstitious Uses.—A bequest for giving alms "for spiritual benefit was held void for uncertainty(*t*). But the question whether a bequest in relation to expenses and charitable distribution within one year which was considered necessary under the Jewish religion was left open.

Bequest for the Erection and Maintenance of Tomb.—A direction in a will that money should be spent for the building of a tomb and its maintenance does not constitute a charitable endowment(*u*). A provision in a will that the testator should be buried in a Samadhi and that a Matam be erected over it where daily pooja should be performed is not a dedication of property to a public charity(*v*). In *Tudor on Charities*, 5th Edn., p. 61, it is stated that cases relating to a gift of the income of a fund for the upkeep of a tomb followed by a gift of the particular residue to a charity have received exceptional treatment in England. But this exceptional rule of English law does not apply to India, (see observations of Leach, C. J., in the above case at p. 860.) In *re Eighmie(w)* a bequest to charity for keeping the burial ground and monument of the testatrix's husband and of herself in good repairs was held valid. But in a later case it was held that according to English law a bequest for the upkeep of the tomb and for the maintenance of mausoleum was not a charitable object(*x*).

Other Religious Uses.—A bequest to Vicar and Church Wardens of the parish of Oakham was held good(*y*), also a bequest to the treasurer of the Society of infirm Roman Catholic Priests of the Diocese of Clifton is good(*z*). A bequest to the Archbishop of Westminster on trust that he should "in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for the Roman Catholics in the British Empire in such manner in all respects as he might think fit" was held to be valid(*a*). A bequest to apply residue for the benefit of persons employed in evangelistic work including retired missionaries as the trustees shall in their absolute discretion select is valid(*b*). It was observed in this case that in the case of bequest for the advancement of religion it is not essential that there should be an element of poverty. A bequest for the performance of ceremonies and giving feasts to Brahmins is good(*c*); a

(s) 46 Cal. 951.

(t) *Joseph Ezekiel v. Aaron Hye*, 5 Beng. L. R. 428.

(u) *Kunhamutty v. Ahmed Musaliar*, 58 Mad. 204.

(v) *Draivasundaram v. Subramania*, (1945) Mad. 854.

(w) (1935) 1 Ch. 524.

(x) *In re Dalziel*, (1943) 1 Ch. 277.

(y) *In re Royce*, (1940) Sol. Journal; (1940)

1 Ch. 514.

(z) *In re Foster*, (1939) 1 Ch. 22.

(a) *In re Ward, Public Trustee v. Ward*, (1941) 1 Ch. 305.

(b) *In re Mylne, Potter v. Dow*, (1941) 1 Ch. 205.

(c) *Lakshmi Shanker v. Vajinath*, 6 Bom. 25; *Kedar Nath v. Atul Krishna*, 12 C. W. N. 1083.

bequest for performing ceremonies and *Pooja* is good(d); a gift to keep choultry in repair is good(e); a gift for the maintenance of Anna Chutra is good(f).

Mahomedan Law.—The following are the instances of religious purposes recognised under the Mahomedan law.

- (1) A trust for the benefit of the poor, for aiding pilgrimages, and marriages, for the support of wells(g). But payment of marriage expenses of certain persons is not charity(h).
- (2) Providing Imam for a Mosque (Bailies Digest 574).
- (3) Celebrating the birth of Ali Murtuza(i).
- (4) Keeping Tazias in Mohorrum month.
- (5) Repairs of Imambaras.
- (6) Performance of Kadum Sharif ceremonies(j).
- (7) Burning lamp in a Mosque(k).
- (8) Reading of Koran at public or private places(ibid).
- (9) Performance of annual Fatha ceremony of the settlor and of the members of his family(l).
- (10) Performance of Fateha ceremony and Urs at the tomb of individuals(m).
- (11) Trusts for the poor relations of a Mahomedan have been recognised as valid in spite of rule against perpetuity(n).

LOCALITY CASES

Trusts for the benefit of the inhabitants of a particular locality are regarded as charitable and the principles laid down by English authorities apply to British India(o). In *In re Smith, Public Trustee v. Smith*(p) the gift was "unto my country England" and it was held that every area and purpose which would fall within the gift was charitable and the gift was upheld. In this case the questions that were argued were (1) Is a bequest to a Country-England good? and (2) and whether such a bequest is charitable and both the questions were answered affirmatively. This case was considered in *Salvekar v. Commissioner of Income Tax*(q). In *Mitford v. Reynolds*(r) a testator gave the remainder of his property to the Government of Bengal to be applied to charitable benevolent and public works in the city of Dacca and the bequest was held to be good. In *Prabha Kuwerbai v. Kasumbhai*(s) Kania, J., considered both the cases *In re Smith and Mitford v. Reynolds*. In that case the bequest was "for the purpose of education and for rendering help to the poor and for any other purpose of public service deemed proper by the executors at my native place at Chotila in Kathiawar in memory of myself and my respected father and mother". The Gujarati expression used "for other purposes of public service" was "lokopyogi". It was contended that there was a general charitable intention for the village of Chotila but it was held that the

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| (d) <i>Benode Behari v. Nistarini</i> , 33 Cal. 180 (P. C.). | (m) <i>Azimunissa v. Sirdar Ali Khan</i> , 29 Bom. L. R. 484; A. I. R. (1927) B. 387. |
| (e) <i>Gulam Husain v. Aji</i> , 4 M. H. C. R. 44. | (n) <i>Mukarram Ali Khan v. Anjuman-un-Nissa Bibi</i> , 45 All. 152; <i>Saiyed Shabbir v. Shaikh Astug Hussain</i> , 4 Luck. 429. |
| (f) <i>Adv.-General v. Strangman</i> , 6 Bom. L. R. 56. | (o) <i>In re Tilak Jubilee Fund</i> , 48 Bom. L. R. 1027 at 1031. |
| (g) <i>Fatmabai v. Adv.-General</i> , 6 Bom. 42. | (p) (1932) 1 Ch. 153. |
| (h) <i>Abdul Karim v. Rahimabai</i> , 48 Bom. 67. | (q) 48 Bom. L. R. 1027. |
| (i) <i>Biba Jan v. Kalle Husain</i> , 31 All. 186. | (r) 1 Ph. 155. |
| (j) <i>Phulchand v. Akbaryar Khan</i> , 19 All. 211. | (s) (1940) Bom. 761. |
| (k) <i>Mozar Hussain v. Abdul</i> , 38 All. 400; 9 I. A. 758. | |
| (l) <i>Lakshmipal v. Amir Alam</i> , 9 Cal. 176. | |

words "purposes of public service" were too vague and the mere limitation of the place where the money was to be used did not remove the uncertainty and the bequest failed on the ground of vagueness.

POOR RELATIONS

Relief of Poverty.—English Law. English law on the relief of poverty is different from the Indian law. According to English law a trust the income of which is to be applied in perpetuity for the benefit of poor relations or poor descendants of the testator is charitable. (See Tudor on Charities, 5th Edn., pp. 26-27). Relief of aged, impotent and poor is charitable whether general and indefinite as for the poor of a town or place and on this principle perpetual trusts for the benefit of poor relations or descendants of the testator are charitable, and when by a will a gift is made for the poor with a preference to poor relations, an inquiry, will be directed to ascertain who are poor relations(*t*). (See Halsburys Laws of England, Vol. IV, pp. 113-14). The reason why a trust for the benefit of poor relations is considered charitable by English law is that it tends to the benefit of the community in as much as it serves to prevent the poor relations from being a burden on the public at large and secondly it is a contribution from the bounty of the testator made to them to enable them to carry out their duties as citizens(*u*). But even according to English law a bequest to poor relations limited to the statutory next-of-kin is not charitable. (Halsbury, Vol. IV, 128). The question was recently considered by Lord Green M. R. in *In re Compton*(*v*), and his Lordship has expressed a doubt on the correctness of the decision on this subject but declined to overrule them because many such trusts were carried out for generations on the faith that they were charitable, (see p. 139 of the Report).

Indian Law.—Indian law only recognises public charitable trusts. The expression "charitable purposes" used in sec. 4, cl. 3 of the Indian Income Tax Act, 1922, means only public charity. It does not include private trusts for religious or charitable purposes. Gifts for the benefit of poor generally are charitable. Relief of a particular class of persons is also charitable. A gift for feeding poor and indigent Hindus is good(*w*), but in *Commissioner of Income Tax v. Jamal Mahomed*(*x*) it was held that a trust for the maintenance, education and other necessities of the poor descendants of the settlor was not a public trust and was not exempt from the payment of income tax.

Poor Relations.—A bequest to benefit only the poor members of the settlor's family is not a public charitable trust(*y*). In *Attia v. Madha*(*z*) the trust was to spend the income of certain immoveable property "among my members of family who may be poor" and it was held that the intention of the testator was to benefit only the members of his own family who were poor and was not therefore a trust for a public purpose of a charitable nature within the meaning of sec. 92 of the Code of Civil Procedure. In *Manorama v. Kali Charan*(*a*) a Hindu made a bequest for "poor relations, dependants and servants" and it was held to be good. It should also be remembered that so far as the Hindus are concerned sec. 118 does not apply to them.

ADVANCEMENT OF LEARNING

In Statute of Elizabeth the words are "maintenance of schools of learning, free schools and scholars of university, the education and preferment of orphans."

(*t*) *Att.-General v. Northumberland* (Duke, or), 7 Ch. D. 745.

(*u*) *In re De Carteret, Foster v. De Carteret*, (1933) 1 Ch. 108.

(*v*) (1945) 1 Ch. 123.

(*w*) *Rajindra v. Raj Coomari*, 34 Cal. 5.

(*x*) (1941) Mad. 862.

(*y*) *Taw Chew, v. Taw Kock*, A. I. R. (1939) R. 208.

(*z*) 14 Rang. 575.

(*a*) 81 Cal. 166.

The word "learning" is susceptible of various meanings. In Archbishop Whateley's work upon Logic it is placed amongst the equivocal words, that is, words which have two significations. He says learning signifies either the act of acquiring knowledge itself or the knowledge itself. In *Whicker v. Hume*(b) the trust was in favour of the benefit of learning and education in every part of the world and the argument advanced was it was vague for indefiniteness and also that it was of a non-charitable nature but this argument was negatived.

The word "education" may be of different types. It may be primary, secondary or university. It may be philosophical, scientific or literary. A trust in favour of education simpliciter will not be void for vagueness or indefiniteness because the word "education" applies to variety of objects(c). A bequest for the benefit of a selected boy or boys for the training of officers in the Royal Navy or the British Mercantile Marine according to the wish of the individual boy is a bequest for advancement of learning(d).

Charitable bequest under the head of advancement of learning are establishment of schools and institutions of learning which are not strictly private, e.g., establishment of public schools(e), endowment of scholarships and any other object which has the object of spreading of knowledge(f). In *In re Gott, Glazebrook v. University of Leeds*(g), a bequest of £3,000 to found a scholarship for "male students of British and Christian parentage" was held to be a good bequest. In *Tudor on Charities*, 5th Edn. at p. 30 it is stated that "bequests for the education of the donor's, descendants and kinsmen at a school or college" are valid charitable bequests. But this statement of the law was doubted by Lord Greene M. R. His Lordship, however, declined to overrule decisions on this subject as such trusts were carried out for generations(h). In *Arur v. Commissioner of Income Tax*(i) a settlement was made of G. P. Loan notes of Rs. 36,000 the interest from which was directed to be utilized in awarding scholarships to young men or women who were descendants of the settlor's family provided they were of a good moral character and otherwise deserving of encouragement. In case the interest was not exhausted by the award of scholarships as indicated above "the surplus upto 50 per cent of it at the discretion of the trustees may be devoted to award scholarships to deserving applicants in the Saraswat community and the balance to be added to the corpus". A question was raised whether the income was liable to incometax. It was held that this was a private charitable trust for the benefit of the members of the settlor's family or his descendants and the fact that the 50 per cent of the surplus income was given in awarding scholarships to applicants of Saraswat community did not make it public as that was merely a matter of discretion.

In the case of a trust for educational purposes it is the pursuit of knowledge combined with its diffusion that makes the purpose charitable(j). The element of poverty in the educational trust is not essential(k). But the trust must be for charitable purposes and not merely for educational purposes(l).

A trust for the object of national education according to the standard put before the country by the Indian National Congress and for founding and main-

(b) 7 H. L. 124.

(c) *Hidayet Beg v. Beharilal*, (1941) All. 379.

(d) *In re Corbyn*, (1941) W. N. 116. *

(e) *Commissioner of Income Tax v. Pemsel*, (1891) A. C. 581.

(f) *University of Bombay v. Municipal Commissioner*, 16 Bom. 217.

(g) (1944), 1 Ch. 193.

(h) *In re Compton*, (1944) 1 Ch. 378 reversed

in appeal (1945) 1 Ch. 123.

(i) 47 Bom. L. R. 786.

(j) *Midland Counties Institute Case*, 14 T. C. 292.

(k) *University College of North Wales v. Taylor*, 5 T. C. 415.

(l) *General Nursing Council Case*, 14 T. C. 651.

taining a school for imparting such education free from official restriction or management "is a good charitable bequest and is not void either for uncertainty or as being opposed to public policy(m)". But in *In re Ward(n)* a gift "for educational, or charitable or religious purposes" was held to be void for uncertainty. In *In re Osmund(o)* a testator bequeathed a residue to trustees upon trust "in their absolute discretion to apply the same to the medical profession for the furtherance of psychological healing according to the teaching of Jesus Christ", and it was held to be good charity.

As regards skill in games a gift to promote annual chess tournament open to boys upto 21 resident in Portsmouth and in giving prizes to winners was held as valid as it was limited to a particular locality. It was observed that if the trust had been for the encouragement of chess at large the limit would have been overstepped(p).

BEQUESTS FOR POLITICAL OBJECTS

A trust for the advancement of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and, therefore, cannot say that the gift to secure the change is a charitable gift(q). In *In re Tetley, National Provincial and Union Bank of England v. Tetley(r)*, the gift was for "patriotic" purposes or charitable objects" and it was held that the gift was void for uncertainty Russell, J., said "what is or is not patriotic is in many cases a mere matter of opinion. Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of fund for a charitable purpose". A trust for political objects such as influencing of legislatures is not charitable(s). A trust for patriotic purposes is not charitable(t). Any purpose of influencing legislation is a political purpose(u). Finlay, J., has observed: "It is impossible to say that a trust for the prosecution of conservative principles or the principles of any other political party would be a good charitable trust(v)". In *In re Tetley(w)* a gift for "patriotic objects" was held not to be charitable. But in *Bryden v. Samuel(x)* where a testator bequeathed his estate to H. "to be by him distributed amongst such political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of liberal principles in politics as he shall in his absolute discretion select and in such shares and proportions as he shall in the like discretion think fit", it was held that no question of a charitable bequest arose, that there was a class of beneficiaries capable of ascertainment within specified area and the bequest was not void for uncertainty.

In *Subhash Chandra Bose v. Gordhandas(y)* it was held that a gift for the political uplift of India was bad as being too vague and uncertain. Following

(m) *Hidayet Beg v. Behari Lal*, (1944) All. 377.

(n) (1941) W. N. 45.

(o) (1944) 1 Ch. 66.

(p) *Re Dupress Deed Trusts, Daley v. Lloyds Bank*, (1945) 1 Ch. 16.

(q) *Bowman v. Secular Society Ltd.*, (1917) A. C. 406 at p. 442.

(r) (1923) 1 Ch. 258; in appeal *A. G. v. National Provincial Bank*, (1924) A. C. 262.

(s) *Temperance Council v. Christian Churches Case*, 10 T. C. 752.

(t) *Roberts Marine Mansion Case*, 11 T. C. 439.

(u) *Com. of Inland Revenue v. Temperance Council of the Christian Churches of England and Wales*, (1926) T. C. 748.

(v) *Bonar Law Memorial Trust v. Com. Inland Revenue*, 17 T. C. 508 at p. 516.

(w) (1923) 1 Ch. 258.

(x) (1933) 1 Ch. 678; 40 T. L. R. 162; 149 L. T. 162.

(y) 42 Bom. L. R. 112, (1940) Bom. 254.

this case it was held in *In re Lokmanya Tilak Fund*(z) that the trusts for the benefit of a particular political party or for the advancement of particular political opinion are not regarded as charitable. In *In re Salvekar* (a) the Bombay High Court has held that trusts for the benefit of a particular political party or for the advancement of a particular political opinions are not charitable. Kania, J., has observed in this case that where the dominant purpose of the trust is political, it is not charitable. But in the *Tribune Press Case*(b) it was held by their Lordships of the Privy Council that a trust to maintain the press and the newspaper "Tribune" in an efficient condition "keeping up the liberal policy of the said newspaper" which was founded by the testator was a trust the object of which was to supply the Province with an organ of educated public opinion and was one of general public utility and hence was charitable and was free from the payment of income tax.

III ADVANCEMENT OF COMMERCE, HEALTH AND SAFETY

These comprise bequests for hospital(c), construction of bridges, roads, dharmasalas(d).

IV ADVANCEMENT OF ANY OTHER OBJECTS BENEFICIAL TO MANKIND. CHARITABLE AND/OR BENEVOLENT PURPOSES

The expression "beneficial to mankind" or "benefit to the community" is difficult to define or circumscribe(e). A purpose may be charitable or beneficial, although opinions differ as to its expediency or utility. The expression "charitable purposes" changes with the passing of years in their nature and objects and the Courts take a liberal view in favour of any bequest which appears to be for the benefit of the community or to be actuated by charity or benevolence(f). In *In re Diplock, Winton v. Diplock*(g) the testator had bequeathed the residue of his property "for such charitable institution or institutions or other charitable or benevolent object or objects in England as my executors may in their absolute discretion select and to be paid to or for such institutions and objects if more than one in such proportions as my executors may think proper". It was argued that the word "benevolent" was not *prima facie* charitable. The lower Court held that it was not bound to read the words so as to defeat the testator's intentions; and held that the bequest was a valid charitable bequest, but on appeal the decision was reversed and it was held that the bequest was void for uncertainty. It was observed by the Appeal Court that it was well settled that a bequest for charitable or benevolent objects was void for uncertainty and the word "or" could not be read as "and". Leave has been granted to appeal to the House of Lords.

In *Hunter v. Att.-General*(h) Lord Davey has stated: "that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as "charitable or benevolent" or "charitable or philanthropic" or "charitable or pious purposes") or where the description includes purposes which may or may not be charitable (such as undertaking of public utility) and a discretion is vested in the trustees the whole

(z) (1942) I. T. R. 26.

(a) 48 Bom. L. R. 1027.

(b) *Trustees of Tribune Press v. Com. of Income Tax*, 41 Bom. L. R. 1150 (P. C.) 20 Lab. 475; 66 I. A. 241.

(c) *Fanindra v. Adm.-General*, 6 C. W. N. 321.

(d) *Jai Narain v. Ujagar Lal*, 27 Bom. L. R. 718 (P. C.).

(e) *General Medical Council Case*, 13 T. C. 847; *Hon'ble Company of Masters and Marine Case*, 17 T. C. 307.

(f) *Falkirk Temperance Case*, 11 T. C. 371.

(g) (1940) 1 Ch. 988; (1940) W. N. 286, reversed in appeal (1941) 1 Ch. 258.

(h) (1899) A. C. 309; 68 L. J. Ch. 449.

gift fails for uncertainty. This is because the purpose of the trust being so general and undefined, the Court will not execute them.

The other rule is that if the testator has left his will so vague and uncertain the Court will not make a new will for him. An attempt was made in *In re Horrocks*(i) that the word "or" was a typist's error for "and" in a clause in the will for "charitable or benevolent" objects but the attempt failed. The Court held that it had no jurisdiction to make an alteration of this kind as so to do would be to make new will. In *Attorney-General of New Zealand v. The New Zealand Insurance Co. Ltd.*(j) their Lordships of the Privy Council observed that many testamentary bequests have been shipwrecked on the word "benevolent". In this case the bequest was towards institutions, societies or objects established in or about Auckland for charitable, benevolent, educational or religious purposes "such amounts as the trustee in his absolute discretion shall deem advisable." Their Lordships observed that the want of precision was inherent in the will, the word "benevolent," however, circumscribed the local area, but even assuming that the gift was to benefit the existing institutions in or about Auckland still the bequest was not precise and was, therefore, void. In *Taw Chew v. Taw Cock*(k) it was observed that when the words used were "charitable and benevolent" purposes any object to be beneficial must possess both the characteristics and accordingly they would constitute a good charitable trust of a public character. But where the words are "public, benevolent or charitable purposes" the gift would admit non-charitable objects, e.g., objects of private benevolence only, a purely non-charitable purpose and the trust will fail.

In several Indian cases religious and charitable purposes are mixed up with other purposes, e.g., "charitable and benevolent" or "charitable and philanthropic" or "charitable and public" and questions arise how far such gifts are valid. In *Chandunbai v. Dady*(l) a trust was to expend the income upon some one or more charitable, educational or philanthropic institutions calculated to promote the public good and the bequest was held to be void. In *Trikumdas v. Haridas*(m) the testator directed his executors to expend the residue as they thought proper "for the purposes of popular usefulness or for the purposes of charity" and it was held to be bad. In *Mitford v. Reynolds*(n) a testator gave the remainder of his property to the Government of Bengal to be applied to charitable benevolent and public works in the city of Dacca. It was held that the bequest was good.

The *ratio decidendi* to be drawn from these cases is that where charitable trusts are mixed up with non-charitable trusts and non-charitable trusts are created by alternative clauses disjunctively used the trusts will fail. But where the trust is exclusively for charity or exclusively for charitable objects the diversity or multiplicity of such objects to which the charity may be applied will not render charity vague or indefinite. The essential thing to make a charity vague, indefinite or uncertain is that it should be mixed up with non-charitable objects or it should include objects both of a charitable and non-charitable nature alternatively or disjunctively(o).

CHARITY AT TRUSTEE'S DISCRETION

A testator is not permitted to delegate to others the disposition of his property; subject to this that he may confer upon his trustees a power of selection and apportionment among a definitely prescribed class of beneficiaries. In

(i) (1939) P. 198.

(j) 41 C. W. N. 321; A. I. R. (1937) P. C. 8.

(k) A. I. R. (1939) R. 203.

(l) 26 Bom. 632.

(m) 31 Bom. 583.

(n) 1 Ph. 155.

(o) *Hidayet Beg v. Behari Lal*, (1941) All. 379 at pp. 390-391.

Smith v. Massey(p) the bequest was to expend the residue "in such charities as the trustee may think deserving" and the bequest was held to be valid. In *Chaturbhuj v. Commissioner of Income Tax*(q) the testator by his will empowered his trustees to "utilise my residuary property for such acts of charity as he deems proper" and it was held to be a good charitable bequest. In England also a bequest to such religious and charitable purposes as the executors may think proper was upheld(r). Law favours charities and notwithstanding the wide extent of the word "charity" permits a testator to direct a fund to be distributed amongst such charities and in such proportions as his trustees may in their discretion decide. But it is now settled beyond dispute that a trust by a testator in favour of benevolent objects to be selected by trustees does not answer this requirement and is insufficient because of its indefiniteness on account of the use of the word "benevolent"(s). The leading case on this is *Blair v. Duncan*(t) where a bequest "for charitable or public purposes as my trustees think proper" was held to be void for uncertainty. In *Chichester Diocessan Fund v. Simson*(u) the House of Lords has finally held that a bequest "for such charitable institution or institutions and other charitable or benevolent object or objects in England as the executors should in their discretion select" is void for uncertainty."

Where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally(v), (*Hailsbury*, Vol. 4, p. 172). The trustees must exercise their discretion with an absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. If the discretion is properly exercised they are not bound to give any reason for the conclusion they adopt. The Court does not interfere with the exercise of discretionary power by the trustees unless it is exercised corruptly(w). The duty of the Court is confined to seeing that the discretion has been properly exercised(x).

In all such cases it is essential to bear in mind that objects of selection must satisfy all the requirements of a charity, viz., that the trust must be for charitable purposes. On this ground trusts "for charitable and benevolent" uses have been upheld. But if the objects of the trust are stated in indefinite terms, e.g., "for charitable or benevolent uses and a discretion is given to the trustees, the trust is void on the ground that the trustees may give the entire income to non-charitable objects(y). The recent decision on this point is *In re Osmond*(z), where a testatrix bequeathed the residue of her estate to trustees upon trust "in their absolute discretion to apply the same to the medical purposes for the furtherance of psychological healing according to the teaching of Jesus Christ" and an affidavit by a distinguished physician was put in showing that psychotherapy was well known and practised in many hospitals. But the question was whether the absolute discretion of trustees was limited to the furtherance of psychological healing for charitable purposes. It might be used for non-charitable purposes and the bequest failed. In *Parbati v. Ram Barun*(a) a testator bequeathed "the rest and residue of my estate" to his executors "to spend and give away the whole in charity in such manner and in such religious and charitable purposes as he may

(p) 30 Bom. 500.

(q) 48 Bom. L. R. 68.

(r) *Baker v. Ruiton*, 1 Keen 224.(s) *Att.-General of New Zealand v. New Zealand Ins. Co. Ltd.*, 41 C. W. N. 321 (P. C.).

(t) (1902) A. C. 37.

(u) (1944) A. C. 841.

(v) *Doyley v. Att.-General*, (1785) 4 Vin. & Abr. 485; *Salisbury v. Denton*, (1857) 3 H. & J. 529.(w) *Warren v. Clancy*, (1898) 1 Ir. R. 127.(x) *Rooke v. Dawson*, (1895) 1 Ch. 480.(y) *Hunter v. Att.-General*, (1899) A. C. 309.

(z) (1944) W. N. 4.

(a) 31 Cal. 895.

in his absolute discretion think proper" and it was held to be a valid charitable bequest. In *Salvalkar v. The Commissioner of Income Tax*(b), Kania, J., has observed that a "general charitable intention is to be upheld by law and any discretion vested in the trustees to be exercised within the limits (not uncontrolled) will be given effect to." The main point involved and decided in this case was that the law did not permit the administrator of a trust which can be used at the discretion of the trustees entirely for an object which according to law was non-charitable, though the trustees may regard it to be charitable.

The law on this point has been stated by Lord Davey in *Hunter v. Att.-General* (supra) as follows :—"What, then, is the law applicable to the case? There are two classes of authorities. On the one hand there is a long series of cases extending from *Morice v. Bishop of Durham*(c) decided by Sir William Grant and Lord Eldon to, *In re Macduff*(d) decided by the Court of Appeal in 1896 and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them, (such as 'charitable or benevolent' or 'charitable or philanthropic,' or 'charitable or pious purposes' or where the description includes purposes which may or may not be charitable such as 'undertakings of public utility') and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Re Teley*(e) a bequest was made "for such patriotic purposes or objects and such charitable institution or institutions in British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper". The bequest was held to be vague and uncertain. The same principle was held to apply in India(f) where it was observed that where the words used are "charitable and benevolent" purposes any object to be benefited must possess both the characteristics and accordingly they will constitute a good charitable trust of a public character. But where the words are "public, benvolent or charitable purposes" the gift would include non-charitable objects, e.g., objects, of private benevolence only and the trust will fail. On this principle the gift failed in the cases, noted below(g).

There is also another class of cases in which there is a general overriding trust for charitable purposes but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law, in such cases the trust is good and the Court will give effect to the general charitable trust but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable(h). These cases are considered in *Muhammad v. Azimuddin*(i).

There is also another class of cases in which the property is given to trustees absolutely to be used by them in such manner as they like for charitable purposes. Such a case arose in *Advocate-General v. Hormusji*(j) where the words used in a deed of trust were "upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they may think fit." The lower Court relying on the decision *In re Williams*(k) and having regard to the word "absolutely" used, held that no valid charitable trust was created but this decision was reversed in appeal and it was held that the trust was valid and a scheme was ordered to be framed. The same question arose in *Subhas*

(b) 43 Bom. L. R. 1027.

(c) 9 Ves. 399.

(d) (1896) 2 Ch. 451.

(e) (1923) 1 Ch. 258; (1924) A. C. 262.

(f) *Taw Chew v. Taw Cock*, A. I. R. (1939) R. 208.

(g) *Chandunbai v. Dady*, 26 Bom. 632; *Tricumdas v. Haridas*, 31 Bom. 583; *Dayabbai v.*

Chimanlal, 40 Bom. L. R. 418.

(h) *Sinnett v. Herbert*, (1872) L. R. 7 Ch. 232; *In re Douglas, Obert v. Barrow*, 35 Ch. D. 472.

(i) (1941) All. 448 at p. 456.

(j) 29 Bom. 375.

(k) (1897) 2 Ch. 12.

Chandra Bose v. Gordhandas(l), where a testator by his will after giving certain legacies gave "the balance of my assets.....to be handed to B to be spent by B or by his nominee or nominees according to his instructions for the political uplift of India and preferably for publicity work on behalf of India's cause in other countries." Two questions were raised: (a) whether the gift "for the political uplift of India" was valid in law and (b) if not whether B took the residue absolutely. The lower Court held that it was invalid and the residue was undisposed of. The Appeal Court also held that the bequest did not fall within any of the recognised classes of valid bequests and, therefore, failed. As regards the second point whether B took absolutely, their Lordships of the Appeal Court held that the words "to be handed over to Subhash Chandra Bose" constituted a trust and that there was no beneficial gift to Bose and as the trust failed there was an intestacy.

There is also a third class of cases where no trustees are appointed but a bequest is made to the widow or near relative of the testator absolutely but with a request that whatever may remain as surplus of the income or corpus the legatee shall use the same for charitable purposes. In *Mahim Chandra v. Hara Kumari*(m) the testator bequeathed the property to his wife with the words "my daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your (widow's) death and she shall enjoy the same keeping up and maintaining the aforesaid 'Sheba'." It was held that the widow took the property for life with power of alienation but to the extent to which such power was not exercised the daughter took the property. The question in this case was: what interest did the daughter take? It was held that the bequest to Hara Kumari was absolute and that the provisions for keeping up the Sheba was merely a collateral charge on the property. In *Bhuribai v. Advocate General*(n) the Court had to construe a will by a Hindu wherein he bequeathed to his wife the whole of his property moveable as well as immovable "as the absolute owner" with authority to make use thereof in any way she liked. "She may sell the same if she so chooses or she may make a will.....I am confident that my wife Bhuribai will give away my properties in charities in such manner as she likes. But if my wife dies without making a will or any other arrangement at the time of her death as to for what charitable purposes my properties are to be used then after her death Bhai Shivanarayan and Manordas shall take possession of whatever property belonging to me may have remained over and shall use the whole of my remaining property in charities such as education, sadavarat, dharamshalla, temple &c. or shall render help to any of my relatives who may be in poor condition." The question for construction was what interest the widow took. The Court held that reading the will as a whole the testator wanted to make and in fact made his widow the full owner of his property and there was no bequest or trust created in favour of charity.

Other Charitable Uses:—In *Re Robinson, Besant v. German Reich*(o) a bequest to German Government for the time being for the benefit of its soldiers disabled in the late war was held to be good and not against public policy. A residuary bequest for founding, establishing and maintaining a charitable institution called "The Beaumont Animal Benevolent Society" the members of which should be anti-vivisectionists and opponents of all sports involving the pursuit or death of any stag, deer, fox, hare, rabbit, bird, fish or any other animal was held to be bad(p). A gift in favour of or for the preservation of animals without the necessary element of benefit to the community is not charitable. Such a gift can only

(l) 42 Bom. L. R. 89.

(o) (1931) 2 Ch. 122.

(m) 42 Cal. 561 (in appeal *Hara Kumari v. Mahim Chandra*, 12 C. W. N. 412).(p) *In re Gove Grady, Plowden v. Lawrence*, (1929) 1 Ch. 557.

(n) 45 Bom. L. R. 669.

be for the benefit of the community if it conduces to the moral, physical or intellectual well being of the community.

In the Bombay High Court Suit No. 1408 of 1938 *Husein Abdul Karrim v. Gulibai Noormahomed* a testator directed that the surplus of his property after meeting certain bequests in favour of his wife and others should be spent "for the good and benefit" of the Khoja Sunnat Jamat. He also directed that after the death of his wife, his bungalows and houses should be used for the benefit of the said Jamat. The question arose whether the gift of the income of the estate of the deceased "for the good and benefit" of the members of the Khoja Sunnat Jamat was a gift for public charitable purposes. In giving judgment Somjee, J., said that it was contended by counsel of the 1st defendant that the gift "for the good and benefit" of the Khoja Sunnat Jamat was vague and uncertain and, therefore, void. Counsel referred to Tudor on Charities where it was stated that a bequest upon trust must be sufficiently definite. This rule was, however, subject to an important exception that although the objects of a trust might be uncertain, if they were certainly of a charitable nature the trust should not fail. The general rule that no trust would be enforced by the Court unless it was for the benefit of ascertainable individuals or ascertainable class of individuals or for a charitable purpose. There was no doubt that Khoja Sunnat Jamat was an ascertainable body of individuals. The only contention was that the purpose of the gift was not an ascertainable charitable purpose because it was argued that what might be "for the good and benefit" of the community might be charitable and might also be for some purpose other than charitable. His Lordship referred to the Indian Succession Act and said that there was no provision therein to indicate what a valid charitable purpose was. Religious or charitable uses were mentioned in sec. 118 of the Act and some instances of such uses were given in the illustration to that section, but those instances were not exhaustive. His Lordship also referred to s. 18 of the Transfer of Property Act and said that this section recognised that there could be a valid disposition of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. This provision clearly indicated that the expression "any other object beneficial to mankind" was understood in law to mean a valid charitable object or purpose. His Lordship referred to Halsbury, Vol. IV where it was stated that gifts for the benefit of a country, borough, town or parish in general terms were charitable. So also the gifts in general terms for the benefit of the inhabitants or a class of inhabitants of a particular locality. In *Wrexham Corporation v. Tamplin*(q) the testator bequeathed to the mayor, aldermen and burgesses of the borough a legacy to be spent and applied in the discretion of the Mayor and the Corporation in the best way for the use and benefit of the borough or its inhabitants or institutions and it was held that the gift was for a valid charitable object. His Lordship referred to (*Adv.-General v. Yusufalli*(r)) where it was held by Marten, J., that, although a gift for public purposes generally was void as being so general and undefined that it could not be executed by the Court, yet a gift for public purposes in a specified locality was a valid charitable gift. His Lordship came to the conclusion that here the body of individuals for whose good and benefit this gift was made was a small community of Sunni Khoja, that the words "for the good and benefit" could not in law be understood to mean anything other than a public charitable purpose and he held that the gift was a valid charitable gift. This decision is not reported.

The following are held to be good charitable gifts :—

(a) a gift for money for building a well and an *avada*(s) for *Sadavarat*(t) for building of Dharamshalla and temples(u).

(q) (1878) 21 W. R. 768.

(r) 24 Bom. L. R. 1060.

(s) *Jamnabai v. Khimji*, 14 Bom. 1.

(t) *Morarji v. Nenbai*, 17 Bom. 251.

(u) *Jai Narain v. Ujagar Lal*, 27 Bom. L. R. 713 (P. C.).

Charity And Income Tax.

Under the Indian law income from charity has been exempt. Under Act II of 1886, any income derived from property solely employed for religious and charitable purposes was exempt. Under Act XI of 1922 sec. 4(8) as amended by Act VII of 1939 exemption is granted in respect of (i) any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in case of property so held in part only for such purposes the income applied or finally set apart for application thereto.

(ii) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(a) the business is carried on in the course of carrying out of a primary purpose of the institution, or

(b) the work in connection with the business is mainly carried on by the beneficiaries of the institution.

(iii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.

The expression "Charitable Purpose" is defined in sec. 4(8) (xi) to include "relief of the poor, education, medical relief and the advancement of any other object of general public utility" but not a private religious trust which does not enure for the benefit of the public. The expression "religious purposes" has not been defined by the Act. But by the Amending Act the income of a private religious trust not enuring for public benefit has been excluded from exemption.

The definition of "charitable purpose" in the Income Tax Act has been taken from the Charitable Endowments Act VI of 1890—(section 2) where it include "relief of the poor, education, medical relief and the advancement of any object of general public utility but does not include purposes which relate exclusively to religious teaching or worship." The definition given in the Income Tax Act goes further than the definition of charity to be derived from English decisions because it embraces purposes of general public utility(v).

"Charity" in relation to trusts in English law has a technical meaning and is not confined to relief of poverty and indigence and it does not embrace all objects of public utility. In English law, therefore, all objects of public utility cannot be regarded as charity. But in India as observed by Sir John Beaumont, C. J., in *Subhas Chandra Bose v. Gordhandas Patel*(w) all works of public utility or benefit may be regarded as charitable and the English decisions have no binding authority on the construction of the words in the Indian Acts, although they may sometimes afford help or guidance. According to Indian law the word "charity" when used in a document in a vernacular language without any qualifications or limitation amounts to a general charitable intention and falls within the definition of "charitable purposes" used in sec. 4 of the Indian Income Tax Act(x).

The expression "charitable purposes" changes with the passing of years in their nature and objects and the Courts take a liberal view in favour of any bequest which appears to be for the benefit of the community or to be actuated by charity or benevolence(y).

(v) *In re Tilak Jubilee Fund*, 43 Bom. L. R. 1027 at p. 1081; *All India Spinners' Association v. Com. Income Tax*, 12 I. T. R. 482,

(w) 1940 Bom. 254.

(x) *Chaturbhuj v. Com. of Income Tax*, 48 Bom. L. R. 63.

(y) *Falkirk Temperance Case*, 11 T. C. 371.

To constitute a purpose beneficial to community the benefit in point of local area need not extend to the public at large, the benefit of the inhabitants of a particular district will suffice(z).

The expression "general public utility" in the Indian Income Tax Act came for consideration before their Lordships of the Privy Council in *Tribune Press Case(a)*. Their Lordships expressed as their opinion "that the question whether a particular object is of general public utility, like the question whether a particular trust is charitable, is a question of law, though doubtless it is for the commissioner to find and state any facts bearing thereon". (See page 250 of the Report). Their Lordships held that the evidence as to the character of the newspaper as it was conducted in the testator's lifetime did not establish that the dominant purpose of the trust was political. The object of the newspaper was to supply the Province where Lahore was situate with an organ of educated public opinion which was an object of "general public utility" and it was therefore exempt from the payment of income tax.

For the purpose of claiming exemption from the payment of income tax the charity must be for public purpose *i.e.* something tending to the benefit of the community. In *In re Mercantile Bank of India*, (see Income Tax Gazette (1942) December p. 164) the trust was that the income of the fund should be applied for the benefit of any of the past, present and future members of the staff and other employees of Andrew Yule and Co. Ltd.....and their dependants of whatever race or class who in the uncontrolled discretion of the trustees shall be deserving of consideration or help, more especially on account of indigence, ill-health or other necessitous circumstances on their retirement. It was held that the trust was not for wholly charitable purposes and was not exempt from payment of income tax. In *C. I. T. Madras v. Aga Abbas*, (Income Tax Gazette (1944) part II p. 22) (1944) 1 M.L.J. 22; it was held that a Wakf for poor relations of the settlor with power to trustees to apply the income in any way they would think best did not fulfil the requirements of sec. 4(3) and was not exempt.

Where no charge is created on the property of a definite sum of income but charitable and non-charitable purposes are specified indiscriminately, discretion being given to the trustee to spend the income upon any object he chooses, it is not a case of partial dedication and the income tax will be assessed on the entire income even though a portion of the income may actually have been used for a charitable purpose(b).

Cy-pres Doctrine :—The *cy-pres* doctrine in connection with charities which enables the Court, in a case where the form of a particular trust for charity is impracticable, to direct an application which is "as near as may be" to the trust declared, has come gradually to be more or less defined. In early days the Courts, under the shelter of this doctrine seem frequently to have had little hesitation in "making a will for the testator" and to have disposed of property given to charity with a very free hand. Not only did the judges shrink from expressing any principle in their decisions, but some of the *cy-pres* cases seem to have been decided on no easily discernible principle at all. Funds were sometimes appropriated for a trust so unlike that designated by the founder as to be at direct variance with it. But the doctrine has in recent times come to be better understood. Judges are not so ready now to order *cy-pres* applications of property given to charity until they are satisfied that the nature of the gift or trust justifies it—that there is what is called "a general

(z) *Yorkshire Agricultural Society's Case*, 13 T. C. 80.
(a) *Tribune Press Trustees v. Com. of Income Tax*, 66 I. A. 241.

(b) *Ibrahim v. Com. of Income Tax*, A. I. R. (1930) P. C. 226, *Com. of Income Tax v. Jamal Mahomed*, (1941) M. 862.

intention" in favour of charity apart from the particular trust directed(c). Where there is merely a gift in favour of the foundation or support or benefit of a definite institution, establishment or society, there is to be deemed no general intention in favour of charity from the fact that the purposes of such institution, establishment or society are charitable and no application *cy-pres* will be directed(d). But when the mention of such an object can be attributed to an express intention of being charitable, or an intention of furthering such charitable work as the definite object of the gift happens to undertake, there is to be deemed a general intention in favour of charity, to which the mention of a definite object of the gift is merely subsidiary. Even then the *cy-pres* doctrine is to be applied only when the literal execution of the intention of the testator becomes inexpedient or impracticable or if the fund should either originally or in process of time be or become greater in amount than is necessary for the purpose, or if direct compliance with the wishes and directions of the author of the trust should turn out to be impracticable(e). The Court has no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because the one might not be so useful as some other that the Court might substitute(f).

The preponderance of authorities is that the doctrine of *cy pres* is applicable only in wills and not in deeds(g). The doctrine rests on the view that charity in the abstract is the substance of the gift and the particular disposition merely the mode so that in the eye of the Court the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy(h). The Court has also no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established simply because the one might not be so useful as some other that the Court might substitute(i). A Court has no jurisdiction to apply *cy-pres* doctrine extra territorium, i.e., when the charitable objects are beyond its territorial jurisdiction(j).

Examples.

(1) A testator bequeathed a certain sum for the discharge and relief of poor debtors detained in prison in Calcutta and at Lucknow and there was a residuary clause. The residuary legatee claimed the legacy as the charity had become impracticable. Held, that the gift was capable of being applied *cy pres*(k).

(2) A testator directed a certain sum of money to be expended for erecting a hall for the performance of marriage and other ceremonies in Bombay for the use of the Parsi community. It was proved that there were several such halls for Parsis in Bombay and the amount was also not adequate for building a big hall. Held, charity be applied *cy pres*(l).

(3) A testator directed a portion of his estate to the worship of his family idol and a residue was left. It was held that the residue may be applied *cy pres* (m).

(4) A settlor directed that a sum of Rs. 500 per month be spent for "such medical and educational charities as shall with the approval of the settlor appear just to the trustees." The charities were not selected and approved. Held, that the charities failed (n).

(5) A testator bequeathed a certain sum to "The Calcutta Armenian orphans College Fund" for the relief of poor families, widows, orphans and schools of Armenians. There

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| <p>(c) <i>In re University of London Medical Science Institute Fund</i>, (1909) 2 Ch. 44; <i>Salebhai v. Bai Saifabu</i>, 36 Bom. 111; <i>Balkrishna v. Vinayak</i>, 34 Bom. L. R. 118; <i>Adv.-General v. Belchambers</i>, 36 Cal. 261.</p> <p>(d) <i>In re Camden Charities</i>, (1881) 18 Ch. D. 310; <i>In re Weir Hospital</i>, (1910) 2 Ch. 124; <i>In the Matter of Hormusjee F. Warden</i>, 32 Bom. 214.</p> <p>(e) <i>Chamberlayne v. Brockett</i>, (1872) L. R. 8 Ch. App. 206; <i>Adv.-General v. S. Webb-Johnson</i>, 52 Cal. 508.</p> <p>(f) <i>Adv.-General v. Fardoonji</i>, 13 Bom.</p> | <p>L. R. 332; <i>In re Weir Hospital</i>, (1910) 2 Ch. 124; <i>In re Knox</i>, (1937) 1 Ch. 109.</p> <p>(g) <i>Santana v. The Adv.-General</i>, 48 Cal. 124.</p> <p>(h) <i>Mayor of Lyons v. Adv.-General</i>, 1 Cal. 303 (P. C.).</p> <p>(i) <i>Adv.-General v. Fardoonji</i>, 13 Bom. L. R. 332.</p> <p>(j) <i>Kanji v. Adv.-General</i>, 18 Bom. L. R. 60.</p> <p>(k) <i>Mayor of Lyons v. Adv.-General</i>, 3 I. A. 32.</p> <p>(l) <i>In re Hormusji F. Warden</i>, 32 Bom. 214.</p> <p>(m) <i>Nanu v. Adv.-General</i>, 9 Bom. L. R. 370.</p> <p>(n) <i>Santana v. Adv.-General</i>, 48 Cal. 124.</p> |
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was no college of the name in Calcutta but there were two institutions for the relief of Armenians one styled "The Church of St. Nazareth" and the other "The Armenian Philanthropic Academy" and they both claimed the amount. It was held that the fund should be applied *cy pres* and be distributed half and half between the two institutions(o).

Charity and Perpetuities.—Another doctrine which is applied to charitable gifts arises in connection with the law as to remoteness. It has been said that charitable trusts, although subject to the law as to remoteness, are not subject to the rule against perpetuities. This means that a trust for charity may be perpetual, but it must take effect before 18 years have expired (in England 21) from the death of an ascertainable person living at the death of the testator. A gift over of property devoted to charity in favour of an individual may fail on the ground of remoteness, but if the gift over is in favour of another charity it is held to be good(p). (Gray on Perpetuities, 3rd Edn., para. 603).

CHAPTER VIII

Of the Vesting of Legacies.

119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Date of vesting
of legacy when
payment or posses-
sion postponed.

Explanation :—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(i) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.

(ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(iv) A fund is bequeathed to A until B attains the age of 18 and then to B. The legacy to B is vested in interest from the testator's death.

(v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(o) *Longbottom v. Satoor*, 1 Mys. H. C. R. 429. (p) *In re Tyler*, (1891) 2 Ch. 252.

(vi) A fund is bequeathed to A, B and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vested in interest in A, B and C, subject to be divested in case A, B and C shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

[This is sec. 106 of the Succession Act X of 1865. It applies to all the wills of Hindus under sec. 57(a) Hindus, etc.]

Date of Vesting when Payment or Possession is postponed.—Estates and interest in property or in the subject of the bequest vest in the legatee in two respects, (a) vest in possession or (b) vest in interest. Sec. 104 deals with the time of vesting in possession. Under that section every legacy vests in the legatee on the death of the testator unless there is anything to the contrary in the will and if the legatee dies without receiving the legacy, his legal representatives are entitled to it. This section deals with vesting in interest when the possession is postponed. Sec. 19 of the Transfer of Property Act is to the same effect.

Meaning of "vest."—The word "vest" being derived from "vestire," it has been said that naturally it refers to vesting in possession, and not to vesting in interest. In ordinary language it is understood to mean "payable." This is however, contrary to the provisions of sec. 119 and the word "vest" has been held to refer *prima facie* to vesting in interest or transmissibility, and not merely to vesting in possession or indefeasibility.

Sec. 119 deals with the subject "vested in interest." A bequest is said to be vested in interest but not in possession, where there is a present *indefeasible* right to the *future possession* or enjoyment, e.g., a bequest to A for life with remainder to B. B has not the immediate possession of the bequest so long as A is alive, but his interest is vested, and if B predeceases A, his legal representatives will be entitled to it. Also if A dies in the lifetime of the testator B will take the legacy^(p1). This section enacts the rule that a legacy vests in interest in the legatee at the date of the testator's death and the mere fact that the possession or enjoyment is deferred will not prevent the vesting *unless a contrary intention appears by the will*.

Unless a contrary intention appears by the Will.—This is one of those sections in the Act where these words occur and the Explanation to the section provides that no inference adverse to vesting should be drawn merely because—

- (1) payment or possession of the thing bequeathed is postponed (ills. i and ii) or by the creation of a prior life or other limited interest in the thing bequeathed in favour of some other person (ill. iii), or
- (2) a direction for accumulation of income is made until the time for payment arrives, e.g., for payment of debts of the testator (ill. v) or
- (3) a provision is made that if a particular event, shall happen the legacy should go over to another person (ill. vi). This is called a defeasance clause in the will.

The question for consideration under this section is to ascertain whether the words of futurity postpone the vesting or merely suspend possession or enjoyment of the thing bequeathed. In the former case the legatee has no interest, in the latter he has an interest which is transmissible to his legal representatives if the legatee dies before the arrival of the period of possession or enjoyment.

Distinction between a Vested Interest and a Contingent Interest. The question whether particular words convey vested or contingent interest is often a question

(p1) *Venkayamma v. Narayamma*, 40 Mad. 540; *Ajudhia Buksh v. Musamut Rukun Kuar*, 11 I. A. 1.

of construction(*g*). The tendency of the Court at the present day is to give words their natural meaning and to ascertain from them what the intention of the testator was(*r*). The presumption is in favour of vesting. If the interest created in favour of a person should take effect on the happening of an event which must happen, it is a vested interest; but if it is to take effect on the happening of a specified uncertain event which may or may not happen the interest is contingent(*s*). "An estate or interest is vested as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed, the time of enjoyment will certainly come to pass; in other words an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed or if in the case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be any one to take the gift; in other words an estate of interest is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain(*t*).

Apart from the instances given in the Explanation, if the will itself contains words indicating that the vesting should not be in the legatee on the testator's death the Court must give effect to it and an example of such intention is the use of the expression "then living" or "then surviving". In *Ganesh Prosad Agarwala v. Mano Har Lal*(*u*), it was observed that ordinarily the words "after the death of the life tenant" operate to vest the property in the remainderman on the death of the testator; but if the word used is "then" *e.g.*, after the death of the life tenant "to vest in the sons who may be then in existence", the intention of the testator is only to vest after the death of the life tenant, and until then the interest of the remainderman is only contingent(*v*).

Another type of case is where the testator postpones the distribution of his property until the property is sold and got in by his executors. Ordinarily under sec. 387 of the Act the executor has one year within which to realize the estate, but the testator may fix a larger period and give discretion to the executors for such a purpose. In such a case the vesting does not take place until the estate is realised and got in(*w*).

Postponement of payment or possession.—When the postponement of enjoyment is made upon the legatee attaining the age of 18 years or other age or any other event which, assuming the requisite duration of life must necessarily happen, then the bequest is not contingent but vested. If the legatee dies before attaining that age, his legal representatives are entitled to it. But this presumption as to vesting does not arise when the gift is on an event such as the marriage of the legatee, which will not necessarily happen at all, however long the legatee lives.

A bequest to a person payable, or to be paid at, or when he shall attain the age of 18, or at the end of any other certain determinate term confers on the legatee a vested interest immediately on the testator's death and is transmissible to his executors or administrators. (See *ills. i*, and *ii*, sec. 119). A gift to A payable at eighteen is vested as the time when the legacy is to be paid is certain, that is to say, the time will come if the legatee lives long enough. No doubt it is uncertain whether the legatee will ever attain the given age, but since he must attain it if he lives, this latter contingency is disregarded.

(*g*) *Kally Nath v. Chunder Nath*, 8 Cal. 377.

(*r*) *Harris v. Brown*, 28 I. A. 159; 28 Cal. 621.

(*s*) *Sree Chand v. Kasi Chetty*, A. I. R. (1938) M. 885.

(*t*) *Basanta Kumar v. Lala Ramsumkar*, 59

Cal. 859.

(*u*) (1939) 1 Cal. 305; A. I. R. (1940) C. 202.

(*v*) *Kaikushru v. Shrinbai*, 48 Bom. 88 F. C.; *Capadia v. Capadia*, 45 I. A. 257.

(*w*) *In re Collinson*, 12 Ch. D. 884.

Examples.

(a) A testator bequeaths to his son £100 *to be paid* to him at the death of his mother. The son dies before the mother. The son takes a vested interest in the legacy and his legal representatives will be entitled to it(x).

(b) A legacy of £100 is bequeathed to an apprentice *to be paid* to him within six months after he should have fully served out his apprenticeship. The boy runs away from his master and dies after the period of apprenticeship expires. The legacy is vested(y).

When the time annexed to the payment is merely eventual and may or may not come, *e.g.*, a legacy to A payable or to be paid on marriage and A dies before the contingency happens, the legacy is contingent.

Example.

A legacy is bequeathed to E *to be paid* to her at the time of her marriage. E died without ever having been married after attaining majority. It was held that the legacy was contingent and lapsed(z).

If the words "payable" or "to be paid" are omitted and the legacies are given "at" eighteen, or "if", "when", "in case", "provided", the legatee attain eighteen or any other future definite period, the legacy will be construed as contingent. Consequently if the legatee happens to die before that period arrives his legal representatives will not be entitled to the legacy(a). (See illustrations i, ii, iii, sec. 120).

Examples.

A testator bequeaths £100 a-piece to the two children of J. S., "at the end of ten years next after my decease." The legatees die before the expiration of ten years. The legacies are contingent and will lapse(b).

If upon the construction of the will it *clearly* apperas that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment, although the words "to be paid" or "payable" may have been employed in the will.

Examples.

(a) A bequeaths £100 *to be paid* to B after all his debts are satisfied. B dies after A but before A's debts are satisfied. The legacy is not vested in B though the words "to be paid" are used. Here the testator shows clearly that the time of payment is after his debts are satisfied(c).

(b) A bequest is made to A for life and after A's death to her "male descendants." A is delivered of a son who dies in A's lifetime. A dies subsequently leaving a husband who claims the legacy as the heir of the son. *Held*, husband not entitled as the son did not take a vested interest. No one can be heir of a living person(d).

As to postponement until the legatee attains an age beyond majority such a direction is considered inoperative and the legatee takes a vested interest on his attaining majority, unless during the interval an interest is created in favour of some person(e). In *Husenbhoy Ahmedbhoy*(f) it was held that where property is left to a person absolutely and the will directs that it should not be handed over to the legatee until he has attained a certain age beyond majority, the direction must be ignored unless the will confers an interest in the property upon some other

(x) *Jackson v. Jackson*, 1 Ves. Sen. 217.

(y) *Sydney v. Vaughan*, 2 Bro. Parl. Ca. 254.

(z) *Atkins v. Hiscocks*, 1 Atk. 500.

(a) *De Souza v. Vaz*, 12 Bom. 137; *Ranee Mani v. Premmont*, 9 C. W. N. 1083.

(b) *Smell v. Dee*, 2 Salk. 415; *Buxton v. Buxton*, (1930) 1 Ch. 648.

(c) *Martin v. Martin*, L. R. 2 Eq. 404.

(d) *Srinivasa v. Dandayudapani*, 12 Mad. 411.

(e) *Gosavi Shivgar v. Rivett Carnac*, 13 Bom. 463; *In re Williams*, *Williams v. Williams*, (1907) 1 Ch. 180; *In re Couturier*, *Couturier v. Shea*, (1907) 1 Ch. 470.

(f) 26 Bom. 319, (followed in *Paru Kutty v. Vasudevan*, (1945) Mad. 323).

person for the intervening period. If it does not then the legatee is entitled on attaining majority to be placed in possession of his legacy.

Intervention of Life Estate :—A mere intervention of a life interest will also not prevent the vesting. If the property is given to A for life and then to B, B has got the vested remainder. Questions for construction arise in such cases whether the bequest is contingent on the remainderman surviving the life tenant and it will depend on the words used in the will. In *Lallu v. Jagmohan (g)*, a testator bequeathed property to his wife in the following words, "When I die my wife is owner of the property and my wife has power to do in the same way as I have absolute power to do and "તેને એ કમ રત્ન હોય તે" i.e. after or in case of her death my daughter M is owner." M died in the lifetime of the widow. It was held that the widow took a life interest and the daughter a vested remainder.

Similarly when the property is bequeathed to two persons for life and the remainder in favour of a specified class of persons on the termination of the life estates, the property will become vested in the class on the death of the testator and the intervention of the life estates will not make it contingent(h). Similarly where a fund is bequeathed to A and B for their lives followed by a direction that at their death or at their deaths, or at or after the death or deaths of A and B the fund shall go to their children, the proper construction is that on the death of each of the said A and B the share to the income of which the deceased was entitled would go to the children of the deceased, i.e., on the death of A leaving children such children would take half, notwithstanding the fact that B was still living(i). In *Bhagabati v. Kalicharan(j)* a will of a Hindu after giving a life interest to his mother and to his wife provided as follows :—"On the death of my mother and my wife the sons of my sisters Golab Sundari and Anupurana, that is to say, their sons who are now in existence as also those who may be born hereafter shall in equal shares hold the said property in possession and enjoyment by right of inheritance." It was held that the testator's nephews took a vested and transmissible interest on the death of the testator, though their possession and enjoyment was postponed. This case was followed in *Mohim Lal v. Gopal Lal(k)* where the bequest was to the daughter of the testator for life and then to her son. The daughter and son both survived testator but the son died in the lifetime of the daughter (his mother) and it was held that the son took a vested and transmissible interest and on the death of the daughter, the heirs of the son were entitled to the property.

Postponement of Possession and Direction for Accumulation of Income.—If the payment or possession is postponed and in the meantime the income is directed to be accumulated within the period allowed by law, that circumstance alone will not prevent vesting. (See ill. v). When the postponement is for the convenience of the estate, e.g., suspension of enjoyment and accumulation of income until the debts of the testator are paid, the legacy is not contingent until all the debts are paid or incumbrances discharged. Where the postponed gift is accompanied by a gift of the whole of the income or a sufficient part thereof to the legatee it makes the gift vested. This is treated under section 120 Exception. According to sec. 104 if a legacy is given generally without specifying the time when it is to be paid it vests in the legatee on the testator's death, though it is not payable till the end of one year after the testator's death (sec. 337);

- (g) 22 Bom. 409, (followed in *Chunilal v. Bai Muli*, 24 Bom. 420; *Jairam v. Kueibai*, 9 Bom. 491 to the same effect).
(h) *Sree Chand v. Kasi Chetty*, A. I. R. (1933) M. 785; *Chandidas v. Malina Bala*, 41 C.

- W. N. 432.
(i) *In re Errington*, (1927) W. N. 42; (1927) 1 Ch. 421 at p. 425.
(j) 38 Cal. 403 (F. C.).
(k) (1940) All. 360.

and if the legatee dies after the testator but before receiving the legacy, his legal representatives will be entitled to the legacy(l).

Postponement of Possession until happening of some Event.—In *Re Collison*, *Collison v. Barber* (m) a testator gave the residue of his property equally among four persons with a direction that in case any of the legatees should die before “the final distribution” of his estate, his share was to go over to his children. Two of the legatees died more than a year after the testator’s death but before the estate had been fully realized and distributed. It was held that “final division” meant the period of a year from the testator’s death and that the shares of the deceased legatees had not gone over. The division of the estate is the period allowed by law, i.e., the expiration of twelve months after the testator’s death. If the legatee dies within the year the gift over will take effect. See also *Lucas v. Carline* (n) where a legacy was given to a servant with a direction that the same should be paid *within* six months after the decease of the testatrix who declared that the legacies should not be vested until payment. The legatee died before the expiration of six months and it was held that his representatives were entitled to it.

Defeasance Clause with or without Gift over :—A clause in a will is a defeasance clause if on an expressed contingency happening the testator has indicated that the bequest is determined whether limited or absolute made to a legatee in the earlier part of the will. Under this Act there may be a termination of that bequest with or without a gift over and in the latter case the bequest so terminated would either fall into the residue or if the bequest so terminated be itself the residue the testator’s heirs would step in. When there is a gift over, the intention to determine the prior bequest is patent; but where there is none it may be in some cases a question and a serious one or a difficult one, if the testator did intend an extinguishment of such a bequest. It is a misconception that a gift over is a *sine qua non* the essence of a defeasance clause(o), and the view taken in *Amulya v. Kalidas* (p) and in *Chandidas v. Malina* (q) is not approved. In *Bhoban Mohini v. Hurrish Chunder* (r) there was no gift over and the clause was taken as a defeasance clause.

A bequest to a person if he should attain majority standing alone would be a contingent bequest; but if the bequest is followed by a limitation over in case he die under such age the bequest over is considered as explanatory of the sense that the testator intended that at that age the bequest should become absolute and indefeasible and must therefore be construed to vest *instantly*. For example, a bequest is made to A for life and then to his son as soon as the son attains majority, with a gift over to B if A should die without leaving a son who should attain majority. A’s son, as soon as he is born, will take a vested interest, subject to be divested if he die under age. (See Jarman on Wills, 6th Edn., p. 1376). If on the death of A, his son is a minor, the son will be entitled to the immediate interest of the bequest, subject only to the chance of its being divested on a future contingency(s).

Where there is a gift to two or more persons as to A, B, and C to be paid to them on attaining 18 with a gift over to D, if *all* die under age, the defeasibility is restricted to the event of all of them dying under age and if any of them, say A, attains age, the gift over to D will not take effect, even though B and C may die

(l) *Harris v. Brown*, 28 I. A. 159, 28 Cal. 621.

(m) 12 Ch. D. 834.

(n) 2 Beav. 367.

(o) *Golak Behari v. Suradhani Dassi*, A. I. R. (1939) C. 226.

(p) 32 Cal. 861 at p. 869.

(q) 41 C. W. N. 432.

(r) 4 Cal. 23.

(s) *Colgan v. Adm.-General*, 15 Mad. 424 at p. 435; *Lallu v. Jagmohan*, 22 Bom. 409; *Chunilal v. Bai Muli*, 24 Bom. 420.

under age. The shares of B and C being vested will, in such a case, pass to their representatives. (Ill. vi. sec. 119) (t).

When there is a gift at 18 or marriage under 18 with consent and a gift over upon marriage without consent, if the legatee attains 18 the gift over will be bad even though the first legatee may have married under age without consent. (Ill. v., sec. 120).

When a legacy is given payable at a given epoch such as the legatee attaining the age of 18 or marriage and there is an intervening life interest so that the legacy is payable only after the death of the life tenant and there is a gift over in the event of the legatee dying before attaining the age or dying unmarried, the two circumstances are construed as follows:—The first circumstance that of attaining the age of eighteen is considered personal to the legatee and the second that of surviving the life tenant one which affects the arrangement of the estate and in determining when the share becomes vested the Court disregards the postponement of the estate and looks at the personal period only (u) e.g., if a bequest is made to G, wife of the testator, for life and thereafter to his married daughter P for life with a proviso that if the daughter died without issue then to the nephew of the testator, the condition as to gift over on the death of P without issue must be fulfilled in the lifetime of the tenant for life viz. G(v).

In some cases the gift over is read strictly, e.g., in *Jones v. Jones* (w) a bequest was made to trustee upon trust for the children of the testator at 21 or married with a gift over in the event of the death of the testatrix without leaving any children surviving her. There was one child who survived the testatrix but died an infant. It was held that the child did not take a vested interest at birth and the gift over did not take effect and there was an intestacy, (See Jarman on Wills, 7th Edn., p. 1322).

Conditional Limitation with or without Gift Over :—A provision in the will that if a particular event shall happen the legacy should go over to another, will not prevent the vesting, unless there is a clear intention to the contrary in the will. (See ill. vi). In English law it is called a conditional limitation. A conditional limitation divests an estate which has already vested, and vests it in another person. Such a limitation does not prevent vesting. Section 131 deals further with such conditional limitations. They are to be distinguished from conditions subsequent which are dealt with under sec. 134.

A bequest to a person if he should attain majority standing alone would be a contingent bequest; but if the bequest is followed by a limitation over in case he die under such age the bequest over is considered as explanatory of the sense that the testator intended that at that age the bequest should become absolute and indefeasible and must therefore be construed to vest *instanter*. For example, a bequest is made to A for life and then to his son as soon as the son attains majority, with a gift over to B if A should die without leaving a son who should attain majority, A's son, as soon as he is born, will take a vested interest, subject to be divested if he die under age. (See Jarman on Wills, 6th Edn., p. 1376). If on the death of A, his son is minor, the son will be entitled to the immediate interest of the bequest, subject only to the chance of its being divested on a future contingency (x).

Where there is a gift to two or more persons as to A, B and C to be paid to them on attaining 18 with a gift over to D, if *all* die under age, the defeasibility is

(t) *Skey v. Barnes*, 3 Mer. 335.

(u) *Mendham v. Williams*, 2 Eq. 396.

(v) *Gobardhone Das v. Prafulla Bala*, A. I. R. (1939) C. 637.

(w) (1906) 1 Ch. 570.

(x) *Colgan v. Adm.-General*, 15 Mad. 424 at 435; *Lallu v. Jagmohan*, 22 Bom. 409; *Chunilal v. Bai Muli*, 24 Bom. 420.

restricted to the event of all of them dying under age and if any of them, say A, attains age, the gift over to D will not take effect, even though B and C may die under age. The shares of B and C being vested will, in such a case, pass to their representatives(y). (Ill. vi., sec. 119).

Effect of Vesting—Vested interest is transmissible—

If a legatee takes vested interest in the bequest, the bequest will be transmissible to his executors, administrators or assigns in the event of his death before receiving the legacy, *e.g.*, a bequest is made to A for life and after his death to B absolutely. B takes a vested interest. B dies in the life time of A after having assigned his interest to C, C will be entitled to the legacy. If B has not assigned his interest his representatives will be entitled to it.

Date of vesting when legacy contingent upon specified uncertain event.

120. (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Illustrations.

(i) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to A "in case he shall attain the age of 18," or "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to A for life, and after his death to B if B shall then be living; but if B shall not be then living to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(v) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that, if she neither attains 18 nor marries under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy although she may have married under 18 without the consent of B.

(vi) An estate is bequeathed to A until he shall marry and after that event to B. B's interest in the bequest is contingent until the condition is fulfilled by A's marrying.

(vii) An estate is bequeathed to A until he shall take advantage of any law for the relief of insolvent debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of such a law.

(viii) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(ix) A leaves his farm of Sultanpur Khurd to B, if B shall convey his own farm of Sultanpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(x) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without B's having married C, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.

(xii) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

[This is sec. 107 of the Succession Act X of 1865. It applies to Hindus, etc.]

Scope of the Section :—This sec. deals with contingent interests and corresponds to sec. 21 of the Transfer of Property Act. This sec. must be read with sec. 131, (see sub-sec. 2 of sec. 131). Contingent interests enacted in this sec. are (a) directly contingent e.g. as in illustration (ii) or (b) contingent on the termination of a prior vested interest e.g. in illustration (vi) where the interest of A is a vested interest in possession subject to be divested and B's interest is contingent. On A's marriage his interest will be divested and B's interest which was contingent will become a vested interest in possession. Similarly in illustration (vii) A's interest which is vested will be divested on his being adjudged an insolvent and B's interest is contingent until then and will become vested on A becoming insolvent.

In some cases the contingency may be not a single contingency but several. In such a case the contingent bequest does not become vested unless and until all the contingencies have happened. Such a question for consideration arose in the case of the will of Eduljee Cowasjee Bisney who by cause 5 of his will directed that on the death of the survivor of his son Jehangir and daughter Ruttanbai, the trustees should sell his property and out of the net sale proceeds should pay two-thirds to the widow and children of Jehangir and one-third to the children of Ruttanbai and in default of such widow and children of Jehangir and the children of Ruttanbai, the trustees should pay the net sale proceeds to the trustees of J. N. Petit Orphanage Fund. Ruttanbai died first without issue and then Jehangir died leaving a widow and children. Question arose whether there was a valid gift over to charity. It was held that the gift over in favour of charity was dependent upon the happening of a double contingency, viz., the deaths of both Jehangir and Ruttanbai without leaving widow or children. There was nothing to show that if Ruttanbai died without children her one-third share should go to charity. Where the two events upon which the gift over is made to depend are independent of each other, there can be no reason for changing "and" into "or." His Lordship Kania, J., observed that sec. 120 (ill. i) and sec. 130 showed that where different contingencies were connected by the word "and," every one of those contingencies must fail or happen as the case might be before the gift over could take place. Here the two events were independent and unconnected with each other and therefore the charity got no interest. (Reported in *Times of India* 20-8-1941. Judgment delivered on 28th July 1941 in Suit No. 572 of 1941 *Jamsedji v. Meherbanoo*).

In *Bhimabai v. Kondaji*, (Bombay High Court Suit No. 1634 of 1941) a testator bequeathed Rs. 4,500 deposited in the Colaba Land Mills Ltd., in the name of his son's daughter Bhimabai "to be paid to her by my executor on her getting a child or five years after her marriage." In case Bhimabai died unmarried or without leaving a child before five years after her marriage then over. The

will was made on 7th April 1932 when Bhimabai was a minor. The testator died on 2nd May 1932. Bhimabai was married in March 1937 and a child was born to her in March 1938. The suit was filed on 5th December 1941. It was held by Kania, J., that the legacy was contingent on two events (a) birth of a child and (b) expiration of 5 years after the marriage. But that as soon as the child was born the legacy became vested and Bhimabai was entitled to receive it with interest from the date of the child's birth (judgment dated 28-7-1942). In *Gangadhar Mullick v. City of Bengal*(z) a Hindu testator had bequeathed the residue of his property to the trustees of Roopchand Dhur Trust Estate on two contingencies (a) in case R the son of the testator dying without male issue and (b) in case R died leaving male issue, such male issue should die under the age of 16 years. R died without leaving male issue and the trustees of Roopchand Dhur Estate claimed the bequest. It was held by their Lordships of the Privy Council, that here the two contingencies were independent and mutually exclusive and the bequest to Roopchand Dhur Estate took effect on the death of R.

Definition of Contingent Bequest :—A bequest is said to be contingent when its vesting depends upon the happening or not happening of a specified uncertain event. In other words an estate or interest is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain(a).

Difference between a Vested Interest and a Contingent Interest :—

The difference between a vested and a contingent interest is that a vested interest takes effect on the testator's death, unless there is a contrary intention in the will. Even though the legatee may not be entitled to immediate possession of the bequest by reason of a prior bequest or by reason of a provision in the will that the income arising from the fund is directed to be accumulated until the time for payment arrives, the legacy nevertheless becomes vested in interest in the legatee from the testator's death, and if the legatee dies before receiving the legacy, it shall pass to his legal representatives.

A contingent interest is contingent upon the happening of a contingency which may or may not take place. A vested interest is unconditional, only the enjoyment may be postponed. A contingent interest is dependent on the fulfilment of the condition which may or may not be fulfilled. In the one the gift is immediate, but the enjoyment may be postponed. In the other there is no gift until the contingency is fulfilled.

Illustrations (i) to (xi) are of contingent bequests ; illustrations (xii) and (xiii) are of Exception.

Where the postponement of the gift is on account of some qualification attached to the legatee the gift is *prima facie* contingent. The use of the words "in case of" (ill. ii) or "when" or "if" (ill. iii) or "until" or "provided" the legatee attains a certain age without further context to govern the meaning of the words makes the gift contingent and will vest only on attainment of the required age. In all these cases the condition is a condition precedent which must be fulfilled before the legacy will become vested(b). But if there is a gift over in the event of the legatee dying under age, it will be construed as vested liable to be divested. (Halsbury, Vol. 34, p. 374).

Where the event on which the vesting depends is such as will not necessarily happen such as the marriage of the legatee, the legacy will also be contingent, (ill.vi). The bequest may be made contingent on the happening of a specified uncertain event (sub-section 1) or on the not happening of such an event (sub-section 2).

(z) 67 I. A. 129.

(a) *Basanta Kumar v. Ramshankar*, 59 Cal. 859 at p. 878.

(b) *In re Edwards, Jones v. Jones*, (1906) 1 Ch. 570.

When the bequest is to take effect on the happening of an uncertain event, it does not vest until the uncertain event happens. Where the bequest is made on the not happening of an uncertain event, it does not vest until the happening of that event becomes impossible. In either case until the condition has been fulfilled the interest of the legatee is contingent. Where the testator makes a gift to a woman for her life if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, then the gift over is contingent and will take effect upon the determination of her estate, *i.e.*, upon her marriage if she marries and upon her death if not. (See illustrations *v* and *vi*). (Halsbury, Vol. 28, p. 805, Hailsham Edn. Vol. 34, p. 384).

Also if the gift is to one person until some event such as bankruptcy and there is a gift over on the happening of such event, the Court infers that the gift over is contingent, (see illustration *vi*). As to condition involving forfeiture of bequest on insolvency, see commentary to sec. 127.

Also if an estate is bequeathed to A for life and after his death to B if B shall then be living, B's interest is contingent until the event happens, *i.e.*, B surviving A, (see illustration *iii*). The words "then living" may mean the period of distribution on the death of the testator or the death of the tenant for life and it is always a question of construction. In *Capadia v. Capadia*(c) the words were subject to the life interest of the widow of the testator "to J for life and in the event of J's death in trust for J's widow and issue as J might by his will appoint to his widow" and in default of any such issue and subject to any such appointment for his widow in trust for K "if then living." J died unmarried in the lifetime of the testator's widow. In the suit filed by K it was contended that the words "then living" related to the last antecedent, *viz.*, the death of the widow and that until the widow died K took no interest. It was held by their Lordships of the Privy Council that on the death of J, K took an absolute vested interest and that it was not contingent on K surviving the life tenant. Similarly in *Rajeshwari v. Rhukhna Kuer*(d) a bequest was made to the wife for life and "on the death of my wife the whole of my estate being treated as 16 annas, three annas shall pass to my daughter-in-law but she shall not have the right to transfer the same, 12 annas shall pass to the two daughters born of the womb of my daughter 'who are still living' in equal shares, *i.e.*, each will take a six anna share and one anna to sister-in-law as absolute proprietors having the right to alienate." It was argued that the words "who are still living" was equivalent to "who shall be still living at the death of the widow of the testator" and made the gift to the grand-daughters contingent on their surviving the widow but this argument was not accepted and it was held that the grand-daughters took a vested interest.

Exception

On the question whether, in a case where a legacy is given at a future date accompanied by a gift for maintenance in the meantime of the whole or such part of the income as the trustees think proper, the legacy vests in the legatee at once or not, the decisions of the English Courts are conflicting. The Indian law on this subject is laid down in this Exception. According to this Exception a legacy payable at a certain time but in terms contingent becomes vested in two cases.

(1) Where a fund is bequeathed to any person upon his attaining a particular age and the will also gives to him absolutely the income to arise from the fund before he reaches that age, the bequest of the fund is vested. The Exception requires that the gift of the whole income should be absolute and not subject

(c) 45 I. A. 257; *Kaikushru v. Shirinbai*, 43 Bom. 88 (P. C.). (d) A. I. R. (1948) P. C. 121.

to charges or annuities. If the whole of the income is given for the maintenance of the legatee until the time fixed for payment, that would be equivalent to a gift of the whole income absolutely and the bequest of the fund would not be contingent.

(2) Where a fund is bequeathed to a person upon his attaining a particular age and the will directs that the whole income or so much of it as may be necessary should be applied for his benefit the bequest is vested. To attract the applicability of the Exception and to make a bequest in terms contingent vested, the direction should be to apply the whole income or so much of it as may be necessary, in other words, power should be given to the trustees to apply the whole or such part as they think necessary of the income of the fund for the benefit of the legatee, see ill. (xii).

In *Cowasji v. Ratanbai*(e) the testator directed his executor to make over the residue of his property to his son if a son was born to his wife who was enceinte when he came of age and in the meantime he directed that income of his property should be applied for the maintenance of the family of the testator, viz., the wife of the testator and the child who might be born and also the executor who was the brother of the testator. If the maintenance of the family did not exhaust the whole income; a discretionary power was given to the executor to spend the surplus income in giving encouragement to education, etc. A son was born to the wife of the testator but he died shortly after his birth. On an originating summons for the construction of the will, it was contended that the bequest to the son was covered by the Exception, that it vested in the son and that the plaintiff, the widow of the testator, became entitled to the property; but this contention was negatived and it was held by their Lordships of the Privy Council (confirming the decision of Kanga, J., and reversing the Appeal Court decision) that the case did not fall under the Exception and the bequest to the son was contingent on his attaining the age of majority; but as the son died under age, the residue did not devolve to the son's legal representatives.

The Exception applies only where a fund is given to a person at a future date on his attaining a particular age and the will also gives to him absolutely a definite ascertained interest to arise from the fund before the person reached that age. If this is wanting the bequest is contingent. See ill. (xii) which is taken from *Harrison v. Grimwood*(f). The interest must arise from the same fund and not from another fund, (see ill. xiii). The interest to be given may be the whole interest or such part of it as may be sufficient for the benefit of the legatee. In this respect the Exception seems to be a departure from English law which requires that the whole of the income should be given to the minor legatee(g). The Exception has no relation to any other contingency, e.g., to his surviving a named person(h). The Exception does not apply if the bequest is to a class on attaining majority and the income is directed to be applied for the maintenance and education of the members of such class, (see ill. to sec. 121).

According to the words used in this section, "or so much of it as may be necessary", it is not necessary that the whole of the income should be given as under English law. Even if a part of the income is directed to be applied for the benefit of the legatee the legatee gets a vested interest. If the trustee is given a discretion to apply the income either whole or in part for the benefit of the legatee

(e) 49 Bom. 167; 27 Bom. L. R. 1 P. C. (in appeal from *Ratanbai v. Cowasjee*, 24 Bom. L. R. p. 1124.
(f) 12 Beav. 192.

(g) *In re Rogers, Lloyds' Bank v. Lorry*, (1944) 1 Ch. 297.

(h) *Sopher v. Adm.-General of Bengal*, A. I. R. (1944) P. C. 67.

according to English law the Exception does not apply. But in *De Souza v. Vaz*(i) where the testator by his will provided that the income shall be applied "at the discretion of my executors towards the maintenance and education of my children until each of my sons attains the age of 21 years" it was held that each son took a vested interest. This decision was not under the Indian Succession Act, 1865, and is contrary to illustration in sec. 121. *Sewdayal v. Official Trustee of Bengal*(j) was the case of a deed of settlement. The settlor settled a fund to his wife for life and the corpus for the use and benefit of the son or sons of the settlor to be made over to him or them at 21, "with power in the meantime to trustees to spend such sum out of the income for the maintenance, education, advancement or benefit of such son or sons as the trustees think fit." It was contended that the said interest was a vested interest under sec. 21 of the Transfer of Property Act. On the other hand it was contended that the Exception could not apply because all that was given was discretionary power to spend such sum as the trustees thought fit and not the whole income. It was, however, observed that the words of sec. 107 of the Succession Act, 1865, (present section) were wider than the English law. But it was held that even reading the words of the Exception, there was no direction within the meaning of the Exception but merely a power and the interest of the sons was contingent. It appears that the bequest to the sons was a bequest to a class and sec. 22 of the Transfer of Property Act would also apply and under that section also the bequest would be a contingent one.

Time within which the contingency must occur.—Where time is fixed for the happening or not happening of a specified uncertain event the legatee does not take a vested interest until the event happens or the happening of that event becomes impossible. As for example, a legacy is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest is contingent until the condition is fulfilled by the expiration of five years without B having married C, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible, *i.e.*, by B marrying some other person. If B marries C within five years A takes no interest. If B does not marry C within five years or marries D within five years A's interest becomes vested. (Ill. x., sec. 120).

Where there is no time fixed for the happening of the event, sec. 124 applies.

Contingent interest not transmissible

A contingent interest will or will not be transmissible to the legal representatives of the legatee according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a given age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects; and consequently such interest can never devolve to the representatives of the child. Generally where the contingency upon which the interest depends is the endurance of the life of the party entitled to it till a particular period, the interest will be extinguished by the death of the party before the period arrives, and will not be transmissible to his legal representatives. For example, a fund is bequeathed to such of the children of A as shall attain the age of 18. No child of A who is under the age takes such an interest in the fund as will be transmissible to his representatives on his dying under that age.

Where, however, the contingency on which the vesting depends is a *collateral* event, irrespective of attainment to a given age and surviving a given period, the death of the legatee pending the contingency does not determine the interest of

the legatee but simply substitutes and lets in the legatee's representatives for himself. For example, a testator directed that in case his wife should die without issue by him, then, after her decease, his brother should get £80. The brother died in the lifetime of the widow, who afterwards died without leaving any issue. It was held that the brother's executors were entitled to the legacy(*k*). (Williams on Executors, 12th Edn., p. 585; Jarman on Wills, 6th Edn., p. 1858).

Hindu Law and Contingent Bequests.—Section 120 applies to Hindus. A contingent interest *in futuro* of the whole estate of the testator is valid and operative(*l*). The following principles of Hindu law must be borne in mind: *Firstly*, that the event on which the gift is contingent must happen, if at all, immediately on the close of a life in being at the death of the testator; and, *secondly*, that a defeasance by way of gift over must be in favour of somebody in existence at the death of the testator(*m*).

Similarly under Hindu law a grant by way of remainder is valid provided—

- (1) it is made to a person in existence at the death of the testator, and
- (2) the grant is to take effect immediately on the close of a life in being at the death of the testator.

In cases, however, governed by the Hindu Transfers and Bequests Act (Madras Act I of 1914), The Hindu Disposition of Property Act (XV of 1916) and the Hindu Transfers and Bequests Act (VIII of 1921) the gift may be made in favour of a person not in existence at the death of the testator.

Vesting of interest in bequest to such members of a class as shall have attained particular age.

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

[This is sec. 108 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section deals with gift to a contingent class. It corresponds to sec. 22 of the Transfer of Property Act. It is a corollary to sec. 120. In the case of legacy to an *individual* on his attaining a particular age and the will gives him absolutely the income arising from the legacy, the legacy is not contingent, and sec. 120 Exception will apply. But if the bequest is to a class on attaining a particular age and the income is ordered to be applied for the benefit of the members of the class in the meantime, the bequest is contingent and this section will apply.

Difference between a Gift to a Contingent Class and a Gift to a Class on Contingency.—There is a distinction between a gift to a contingent class and a gift to a class on contingency. A gift to the children of A "who shall attain the age of 18" is a gift to a contingent class. But a gift to the children of A "at" or "upon" or "when they attain the age of 18" is a gift to a class upon the contingency. In the former case no member of the class will take a vested interest until he attains the age of 18 years, although in the interval interest

(*k*) *Pinbury v. Elkin*, 1 P. Wms. 568; see also, *Ellakasse v. Dossee v. Durponarain*, 5 Cal. 59.

(*l*) *Bhupendra v. Amarendra*, 41 Cal. 642.

(*m*) *Soorjeemoney v. Denobundhoo Mullick*, 6 M. I. A. 526; *Tagore v. Tagore*, 9 B. L. R. 877; *Gangadhar v. O. T. of Bengal*, 67 I. A. 129.

may be directed to be applied for the maintenance, advancement or benefit of all the members of the class, whereas in the latter case such a circumstance might have the effect of vesting the bequest under Exception to sec. 120, such a provision in the case of a bequest to a contingent class will not vest the bequest, (see ill. to this sec.)

Accordingly where there is a gift to a class on a contingent event, the time of the happening of the contingency determines the individuals composing the class. But when a bequest is made to a contingent class to be divided upon their attaining a certain age, *e.g.*, as in the illustration to this section to such children of A as shall attain the age of 18 years, the period of distribution is when the first child of A attains the age of 18 years and the class is then fixed. This rule is known as the rule of *Andrews v. Partington*(*n*). This rule is based on the reason that the child who has attained the age cannot be kept waiting for his share; and if you have once paid him, you cannot get back such payment.

In some cases, however, a bequest is made to a class with a direction that the *corpus* may not be distributed until the youngest child shall attain the age of 18 years. In such a case as soon as a member of the class will attain the age of 18 years he gets a vested interest although it may not be payable to him until the youngest member of the class will attain the age of 18 and in case of his death before the period of distribution, his interest will be transmissible to his heirs, the reason of the rule being that the postponement being partly for convenience of the estate and partly personal to each legatee, every member of a class will take a vested interest upon attaining the given age, notwithstanding that he may die before the youngest attains the given age or the youngest child may fail to attain that age. In *In re Kipping, Kipping v. Kipping*(*o*) a testator bequeathed his property to trustees for sale and conversion with a direction to postpone the sale and to pay £50 to his widow and subject thereto in trust for all and every one of his children and child who shall attain 21 in equal shares, "provided always that the capital should not be divisible amongst my children until my youngest surviving child shall attain 21." The testator left seven children, two attained 21 and five were minors. One of the two claimed his share. It was held that he was entitled on attaining 21 to a vested share but was not entitled to claim it so long as the trustees in the *bona fide* exercise of their discretion determined to postpone the realization of the estate. See also *Hughes v. Hughes*(*o*¹).

CHAPTER IX.

Of Onerous Bequests

Onerous Be-
quests.

122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint, stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (Y). He forfeits the shares in (X).

[This is sec. 109 of the *Succession Act X of 1865*. It applies to *Hindus*. etc. It corresponds to sec. 127 of the *Transfer of Property Act*.]

(*n*) 3 Bro. C. C. 401.
(*o*) (1914) 1 Ch. 82.

(*o*¹) 14 Ves. 256.

Onerous Bequests.—Where onerous and beneficial property is included in the same bequest, the legatee cannot disclaim the onerous and accept the beneficial, unless the will manifests sufficient intention of the testator to the contrary. The legatee has no claim of election; either he must accept the whole or none. If he accepts it, he takes it with all the benefits and burdens. If the condition of the gift requires him to do some act involving expense he is, if he accepts the gift, personally liable for that act being done. But the legatee is not bound to accept the gift. He may disclaim it in which event he forfeits the entire gift.

Disclaimer.—Disclaimer may be made orally or by writing. It may be expressed or implied. If the person is *sui juris* he may be called upon by the executor to intimate his decision. If the legatee unequivocally disclaims, he cannot afterwards claim it nor can he, after having once accepted the gift, afterwards repudiate it.

But if the two gifts are distinct, this section does not apply. In such a case the legatee is at liberty to accept the beneficial one and to disclaim the onerous one (see sec. 123). In all such cases it is a question of construction to see whether the testator has given one aggregate gift or whether there are two distinct gifts. This rule was applied in *Fairlough v. Johnstone*(*p*) although the gifts were in two different parts of the will and of distinct natures as a leasehold house and an annuity. In England since Locke King's Act a collective devise of lands of any tenure to the same set of persons *prima facie* throws the aggregate charges on the aggregate lands(*q*).

There is also another kind of bequests which imposes upon the legatee an obligation, *e.g.*, a bequest of the testator's property to one of his sons A subject to the obligation on him to make some annual or monthly payment to B. In such case if A assents to take the legacy, he takes it subject to such obligation(*r*).

Tenant for life of Leaseholds.—If the testator dies possessed of leasehold property and bequeaths it to his wife for life to reside therein and after her death over, questions arise as to whether the wife if she accepts the bequest is obliged to pay the ground rent and to observe and perform the covenants under the lease so as not to incur forfeiture of the lease and to preserve the property for the remainderman. The English law on this subject upto a certain stage was to distinguish between an equitable tenant for life and a legal tenant for life. If the bequest of the property was through the intervention of trustees, *i.e.*, if the legal estate was vested in the trustees and the beneficial estate to reside in the house was given to the widow, then the widow was not obliged to pay the ground rent and the rates and taxes or to repair and keep in repair the property. But if the testator bequeathed the leasehold property directly without the intervention of trustees, the decisions are conflicting. In respect of the covenant to repair the property a distinction was made as to the repairs to the property at the time of the testator's death and subsequent repairs during the enjoyment of the property by the life tenant. In *re Fowler, Fowler v. Odell*(*s*) it was held that when leasehold houses were vested in the trustees on behalf of a tenant for life it is the duty of trustees to keep the property from the risk of forfeiture and they are entitled to have the rents applied in keeping the house in a proper state of repairs and if the trustees allow the life tenant to receive the rents and the houses are not kept in a proper state of repairs according to the covenant in the lease, the Court will at the intervention of one of the trustees appoint a receiver of the rents for enforcing the proper repairs of the houses. In *Re Courtier*(*t*) the

(*p*) 16 I. Ch. Rep. 442.

(*q*) In *re Baron Kensington* (1902) 1 Ch. 203.

(*r*) In *re Lester, Lester v. Lester*, (1942) W.

N. 118.

(*s*) 16 Ch. D. 723.

(*t*) 34 Ch. D. 136.

testator died possessed of leaseholds, most of them in a bad state of repairs at the time of his death. He bequeathed the same to his wife for life and then to remainderman who applied for an order to oblige the life tenant to put the properties in proper state of repairs to avoid forfeiture. It was held that the tenant for life was not obliged to put the property in repairs and the case of Fowler was distinguished. In *re Baring Jeune Baring*(u) the testator died possessed of a leasehold house under a lease of 61 years renewable every 19 years on payment of fine. He bequeathed the house to trustees in trust for his wife for life with remainder to his son for life with remainder over. He bequeathed the residue to trustees to pay all costs, charges and expenses for carrying out the trusts of his will and to hold the residue for his children. The widow occupied the house. On an originating summons by the trustees it was held following Courtier that the tenant for life was not obliged to pay the ground rent, or to repair, or to insure or to pay fine on renewal but the same were during the lifetime of the tenant for life payable out of the income of the residue. But in *Re Redding, Thompson v. Redding*(v) the decisions in *Re Baring* and Courtier were dissented from and it was held that the tenant for life was obliged to pay the ground rent and current repairs and other outgoings if he accepted the gift. To the same effect is *Kingham v. Kingham*(w) in which the only distinguishing feature was that the widow was not obliged to pay for any repairs which became necessary before her occupation. In *Re Gfers, Cooper v. Gfers*(x), it was held that a tenant for life of leaseholds whether legal or equitable to whom the property is specifically bequeathed for life must during the continuance of her interest pay the rent and perform the covenants and conditions of the lease including the covenant for insurance.

One of two separate and independent bequests to same person may be accepted, and other refused.

123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money.

[This is sec. 110 of the Succession Act X 1865. It applies to Hindus. etc.]

Where a testator makes two distinct bequests in the same will to the same person one of which happens to be onerous and the other beneficial, *prima facie* the legatee is entitled to disclaim the onerous and to take the other. But in such cases it is the question of the intention of the testator to be gathered from the will, whether the legatee must elect to take all or none of the gifts in the will or whether he may accept the beneficial and repudiate the onerous(y).

The rule laid down in this section is enacted in section 127 of the Transfer of Property Act.

(u) (1893) 1 Ch. 61.

(v) (1897) 1 Ch. 876.

(w) (1897) Ir. R. 170; [see also *In re Tomlinson*, (1898) 1 Ch. 233 and *In re Betty*,

(1899) 1 Ch. 821].

(x) (1899) 2 Ch. 54.

(y) *Talbot v. Radnor*, 3 M. & K. 254.

CHAPTER X.

Of Contingent Bequests.

124. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

Illustrations.

(i) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(ii) A legacy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(iv) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B dies without children during the lifetime of A.

(v) A legacy is bequeathed to A for life, and, after his death to B, and, "in case of B's death," to C. The words, "in case of B's death" are to be considered as meaning "in case B dies in the lifetime of A."

[This is sec 111 of the Succession Act X of 1865. It applies to Hindus, etc., It corresponds to sec. 23 of the Transfer of Property Act.]

Scope of the Section.—This section was enacted to give statutory effect to the rule in *Edwards v. Edwards*(z) which was enunciated by Sir John Romilly as follows:—"Where there is an absolute gift to vest in possession at a future time and a gift over in case the legatee should die without issue living at his death, this *prima facie* is to be taken to mean 'if he should die without issue before he is entitled to call for delivery' as it would be very inconvenient that after delivery the subject of the gift should be liable to go over. This rule of English law has been modified by subsequent rulings of the House of Lords in *O'Mahoney v. Burdett*(a), *Ingram v. Soutten* (b), in which the House of Lords decided that where a legacy was given to A for life with remainder to B but if B should die without a child or unmarried, or under 21 then over, the death of B without issue etc. means death at any time and not in the lifetime of the tenant for life as in illustration (iv) which is a reproduction of the rule in *Edwards v. Edwards*. The rule laid down in this section does not apply to a will not governed by this Act(c). This sec. does not apply if a period is specified in the will within which the contingent event is to happen(d). This sec. does not contain the expression "unless a contrary intention appears by the will". It is not, therefore, permissible to imply such words in the section. The rule laid down in this section is a hard and fast rule which must be applied wherever it is applicable regardless of what the testator intended. Even an express declaration of the testator cannot be allowed to control the plain meaning of the section(e).

Period of Distribution.—The words used in this section are "when the fund bequeathed is payable" whereas in sec. 23 of the Transfer of Property Act the words used are "before or at the same time as the intermediate or precedent

(z) 15 Beav. 357.

(a) L. R. 7 H. L. 388.

(b) 7 H. L. 408.

(c) *Ambatal v. Ambatal*, 34 Bom. L. R. 1506.

(d) *Indira Rani v. Akhoy Kumar*, 59 I. A. 419.

(e) *Narendra v. Kamalbasini*, 23 Cal. 563 (F. C.).

interest ceases to exist." This section lays down that where a bequest is contingent upon a specified uncertain event and no time is mentioned for its occurrence the bequest cannot take effect unless such event happens before the testator's death when the fund becomes payable or distributable(f). The difference between this section and sec. 120 is that under sec. 120 the time for the happening of the contingency is mentioned, whereas this section comes into operation when *no time is mentioned*(g). In such a case the test to be applied as laid down by this section is to ascertain *what is the period of distribution*; and this period is either the death of the testator or the death of the life tenant and in case of more than one life tenants the death of the last survivor of the life tenants(h). In ills. (i), (ii), and (iii) the period of distribution is the death of the testator; in ills. (iv) and (v) the period is the death of the tenant for life. If the contingency has not occurred before or at the period of distribution the gift will fail. "The first two illustrations make it clear what may be only implicit in the actual wording of the section, namely, that it does not apply if a period is specified in the will within which the contingent event is to happen, or putting it otherwise, that the section only applies if without doing violence to the terms of the will, it can be held, as a matter of words that the occurrence of the uncertain event prior to 'the period when the fund bequeathed is payable or distributable' is alone within the contemplation of the testator. If the terms of the will make that construction of his words impossible, the section then does not apply"..... "In the first illustration to the section it is possible, without doing violence to the words, to refer the specified death of A, to his death in the lifetime of the testator. And so much being possible, the section requires that A's death shall be so referred. But does not the illustration equally plainly connote that it would have become the illustration of a case to which the section has no application, if instead of being worded as it is, it had run—'A legacy is bequeathed to A, and, in case of his death before or after that of the testator to B,' a case in which the legacy to B, on the testator's very words, must take effect just as certainly if A survived the testator, as if he predeceased him? In other words, A's interest in the legacy B surviving, is cut down to a life interest and section 181 becomes relevant as an enabling provision. That section is made subject to, amongst others, section 124," per Lord Blanesburgh in *Indirarani Ghosh v. Akhoy Kumar Ghosh*(i). But if the terms of the will give to A an absolute estate such as by the use of the word "malik" and that whatever remained after A's death is given to B. B would only get what remained as undisposed of after the death of A.(j). This section applies only where the prior bequest is capable of taking effect and is not void *ab initio*. If a prior bequest has failed *ab initio*, sec. 129 applies.

Gift Over.—A gift over of property, given to a person absolutely in the event of his death is construed as a gift over before the period of distribution or vesting. If the gift is immediate and there is a gift over in case of the donee's death, as a contingency, the gift over takes effect only in the case of the donee dying in the lifetime of the testator as an alternative gift (ill. i), and if the gift is postponed to a life estate, the gift over takes effect only on a death before the tenant for life as an alternative gift (ill. iv).

Generally, death is regarded as a contingent event only from necessity. In a gift to one donee indefinitely followed by a gift over "at the death" or "after the death" of that donee the first donee takes a life estate only and the

(f) *Kamla Prasad v. Murly Manohar* 13 Pat. 551.

(g) *Bhupendra v. Amarendra*, 43 Cal. 432 (P. C.); 43 I. A. 12.

(h) *Cripps v. Wolcott*, 4 Madd. 11; *Poultney*

v. Poultney, (1912) 2 Ch. 541.

(i) 60 Cal. 554 (P. C.); see *Gulabji v. Rustonjee*, 49 Bom. 478.

(j) *Govindbhai v. Dayabhai*, 38 Bom. L. R. 195; A. I. R. (1936) B. 201

gift over takes effect on the death of the first donee. Generally if there is a gift to A with a gift over in the event of his dying under age, the following rules apply :

(1) If A dies under age in the lifetime of the testator, the gift over takes effect.

(2) If A dies after attaining majority in the testator's lifetime, the gift over does not take effect. (Ill. i., sec. 124).

If there is an immediate gift to A and a gift over to B in case of his death, the gift over to B will take effect only in the event of A's death before the testator. (Ill. i., sec. 124). If the gift to A is after a life estate or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession. (Ill. iv., sec. 124).

If there is a gift "at" or "upon attaining twenty-five" with a gift over in the event of the legatee dying under twenty-one, the gift is vested at 21 and the gift over will not take effect(k). In *Re Edwards, Jones v. Jones*(l) a testatrix devised her property in trust for her children or child who being a son "shall attain 21 or being a daughter shall attain that age or marry.....In the event of my death without leaving any children surviving me" then over to the brothers and sisters of the testatrix. The testatrix died in child birth leaving a son who survived his mother only a few hours. It was held that the child did not take a vested interest on birth and the gift over did not take effect. If the gift is at 24, with a gift over in the event of the legatee dying under the given age without leaving issue, the gift over will not take effect if the legatee dies at whatever age leaving issue(m). So also a gift after a life interest to the children of the life tenant at 21 with a gift over in the event of the life tenant dying without leaving issue has been held to be vested at the death of the life tenant but not before. In *Colgan v. Adm.-General*(n), a testator bequeathed Rs. 42,000 to his grand-daughter for life and after her death to her children as she should appoint but in the event of her dying without issue "Rs. 14,000 should be given to her husband", and the grand-daughter died without issue. It was held that the husband took a vested interest.

In cases where the gift over is on death coupled with some other contingency, e.g., on the death of the donee without leaving issue living at the time of his death, then *prima facie* the gift over takes effect on the death of the donee not at any time as under the English law, (Halsbury, Vol. 28, p. 829), but in the lifetime of the life tenant (ill. iv). In *Chumilal v. Bai Samarath*(o) the English rule was applied as the will in that case was not governed by the Act. In construing the wills of Hindus to which this section does not apply the rule laid down in the section should not be applied(p). In *Norendra Nath v. Kamalbasini*(q), a will of a Hindu to which this section applied contained the following clause, "my three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally." One of the sons died sonless after the testator's death and the suit was filed by the surviving sons against the widow of the deceased son to recover the one-third share. The question raised was whether on the son's death without male issue his surviving brother became entitled to his share. It was held that this section applied and the period of distribution was the death of the testator and the gift over failed. This case was followed in *Bashist v. Sia Ramchandra*(r), but was distinguished in *Indira Rani v. Akhoy Kumar*(s) where their Lordships

(k) *Doe v. Moore*, 14 East. 601.

(l) (1904) 1 ch. 570.

(m) *Bland v. Williams*, 3 M & K 411.

(n) 15 Mad. 424

(o) 16 Bom. L. R. 366 (P. C.).

(p) *Bhupendra v. Amarendra*, 43 I. A. 12;

Ambalal v. Ambalal, 34 Bom. L. R. 1506.

(q) 23 I. A. 18.

(r) 15 Pat. 18.

(s) 59 I. A. 419; 35 Bom. L. R. 211; 60 Cal. 554 (P. C.).

of the Privy Council observed that sec. 124 applied only if without doing violence to the terms of the will it can be held as a matter of words that the happening of uncertain event before the period of payment or distribution was alone in the contemplation of the testator. In this case the testator had devised the whole of his estate to his executors in trust "for such of my sons as shall be living at my death or come into existance within 12 months after my death and also for the son or sons of my sons taking equally *per stirpes* as tenants-in-common but so nevertheless that in the event of any son or sons dying without leaving male issue him surviving the other of my son or sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu law." The testator further directed that his estate should not be partitioned "until the youngest of my sons shall attain the age of 25 years but my said sons shall be properly maintained and educated out of income of my estate. If any of my sons try to effect a partition before the aforesaid time he shall forfeit a fourth share of his estate." The testator died in 1904 leaving a widow and two sons both minors. One son died without leaving any son or son's son but leaving a widow Indira (plaintiff). At the time of his death the other son had attained 25. Indira filed the suit against the other son Akhoy Kumar for a declaration that upon the true construction of the will her husband took a vested absolute interest in the moiety of the estate and that upon his death she succeeded thereto. The respondent contended that in the events that had happened the moiety passed to him. Their Lordships of the Privy Council held that the testator contemplated the continuance of the trust for an indefinite period after his death, that the testator further contemplated forfeiture of vested gift and the exclusion of daughter or daughters from any participation. As to the contention urged on behalf of the plaintiff that when her husband died, Akhoy Kumar had attained the age of 25 and therefore the gift to Sidheshwar, the husband of the plaintiff had become absolute under sec. 124 as the event of Sidheshwar's death without male issue contemplated in the will was confined to Sidheshwar's death in the lifetime of the testator, it was held that the death of the son or son's son referred to in the will was the death of one who had taken something under the original gift contained in it, that is, it is a death which must take place after that of the testator; that it was not an uncertain event with reference to which it could be said that no time is prescribed in the will for its occurrence, that sec. 124 would apply if without doing violence to the terms of the will, it could be held that the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable," but the terms of the will made that construction impossible and the section did not apply, but sec. 131 became relevant as an enabling section which was subject to sec. 124. With regard to the further argument urged on behalf of the plaintiff their Lordships held that the true construction was to read the will—"In the event of any of my sons or son's son (to whom a share of the residue has been given) dying without male issue them respectively surviving, the other of my son and sons and son's sons living at the death of the deceased (and being also sons or son's sons entitled to a share of residue under my will and entitled to interest from me under Hindu law) shall take in equal shares the property comprised in the original gift to the deceased." Adopting this construction their Lordships held that these words conveyed the share to a destination sufficiently clearly described and in no sense obnoxious to Hindu law. The question whether the share of the original taker would or would not be subject to defeasance or whether the son or son's son would inherit under Hindu law did not arise, because the gift on either view would be equally valid according to Hindu law and that Akhoy who in the event was the only claimant to Sidheshwar's share fulfilled all the qualifications and the claim of Indira failed.

Death when a contingent event :—Death is always a certain event and if a bequest is on death simpliciter, the bequest is not contingent, *e.g.*, a bequest is

made to A for life and on A's death to B, the bequest to B is not contingent and even if B dies in the lifetime of A the bequest will on A's death belong to the estate of B. The rule of construction laid down by the Judicial Committee in *Indira's* case is a restatement of the general rule that where death is spoken of as a contingency, it will be construed, whenever possible, to mean death before the period of distribution, *i.e.*, when the gift is immediate, death before the testator, or when the gift is in remainder, death before the expiration of the particular estate. The reason behind that principle has been stated to be that where a gift of an absolute interest in property to one person is followed by a gift of it to another in a particular event, the disposition of the Court is to put such a construction on the gift over as will interfere as little as possible with the prior gift. "Where a bequest is made to a person, with a gift over in case of his death, a question arises whether the testator uses the words 'in case of' in the sense 'at' or 'from' and thereby as restrictive of the prior bequest to a life interest, *i.e.*, as introducing a gift to take effect on the decease of the prior legatee in all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event, of all events the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstances in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate (*i.e.* in possession), necessarily is the death of the testator, there being no other period to which the words can be referred." (*Jarman on Wills*, 7th Edn., pp. 2079-80). When the bequest is not immediate but postponed to the occurrence of some event, the time which must be connected with death and before which death must occur in order that the gift over can take effect, should be the date of the occurrence of that event; *e.g.* if a bequest is "to my daughter on attaining majority and on the demise of my daughter, to the eldest son of my executor," the death of the daughter contemplated is not death simpliciter but death before she attained majority and that is the uncertain event within the meaning of this section and the gift over will only take effect, if the daughter dies before attaining majority. If the daughter attained majority the period of distribution is reached. Therefore the specified uncertain event did not take place before the period of distribution and the gift over fails(*t*).

"Die without Issue"

The construction of the words "die without issue" or "die without leaving issue" or "have no issue" or any other words which may import either a want or failure of issue is made simpler by the enactment of this section, and by illustrations (*ii*) & (*iv*) than under the English Statute Wills Act (7 Will. 4 & 1 Vict.) c. 26, sec. 29. If a legacy is bequeathed to A and in case of his death without issue to B, the gift over to B will only take effect if A dies without issue in the lifetime of the testator. But if A survives the testator then whether he dies leaving children or not the gift over to B does not take effect. If A dies in the lifetime of the testator leaving children then also the gift over to B does not take effect, (see *ill. ii*). The reason is that if once the gift to the donee becomes indefeasible when the fund becomes payable, the contingent gift over fails. In this the period of distribution is the death of the testator. (See *Halsbury*, Vol. 34, p. 401). "It is clear that the words 'leaving issue'" in the primary significance point to the period of death. . . . There is a well-known rule of construction which is, sometimes referred to as the rule "in *Mailand v. Chelke*(*u*) and is stated by *Romer, L. J.*, in *re Cobbold*(*v*). . . ."

(*t*) *Purna Chandra v. Sudhangshu*, A. I. R. (1946) C. 55.

(*u*) 6 Madd. & G. 243.

(*v*) (1915) 1 Ch. 847.

"If you have a gift by will to A for life and after A's death to his children in terms which would give them an absolute interest in A's lifetime and then you have a gift over simply in these terms, 'if A dies without leaving children' you are to construe the expression 'leaving' so as not to destroy any prior vested interest. In other words you construe it as meaning—now I read the words as altered—'without having had a child who had attained a vested interest.' That must now be treated as well settled," per Morton, J., in *In re Miller's settlement*(v¹). In that case the expression "without leaving issue" was construed as "without having a child who has attained a vested interest."

In *Naorojee v. Putlibai*(w) a testator bequeathed his property to his son and provided that if the son died unmarried or if married he died without lineal heir his share shall revert equally to his surviving sisters. The son survived the testator and it was held that he took absolutely and the gift over failed. In *Jehangir v. Kaikhusrul*(x) a bequest was made to J and P two sons of the testator with a proviso that if P had a son half the property be made over to that son on his attaining 21 and in case P had no son then J shall give his son to Pas palak (adopted son). The testator died first leaving P and J. P died without a son and after his death J gave his son B as palak to P. It was held that P took an absolute estate and the claim of B failed as the period of distribution was the death of the testator. In *Marie Flora Bhandara v. Banubai P. Bhandara*(y) a Parsi by his will provided thus :—"As long as my daughters may be living so long the house is to remain in the ownership of these people alone. If one of my daughters die then her share shall go (કચરે ભય or ચાલીત ભય) into the hands of her sons; but if she should have no children then her share shall go to the surviving sister." One of the daughters died unmarried and intestate. The other daughter survived. She had a son N who died leaving a widow. The suit was filed by the widow of N against the surviving daughter for construction. It was held that the two daughters only acquired a life interest in the house. As regards remainder it was held that it was given absolutely to the children of the two daughters and as N was the only child he acquired a vested interest and sec. 124 did not apply.

If a life interest is interposed then the period of distribution is the death of the life tenant. Therefore, if a legacy is given to A for life and after his death to B and in case of B's death without children to C, then the gift over to C will take effect only if B dies in the lifetime of A without children. If B survives A, whether he has children or not, C will not get anything, because the gift to B has then become payable. Similarly if B dies in the lifetime of A but leaves children who survive A, the gift to C will not take effect (ill. iv). This rule of construction is imperative and the Courts are not required to ascertain the intention of the testator, because in this section there are no words, "unless a contrary intention appears in the will," as in section 125. As was observed by their Lordships of the Privy Council, "the introduction of such a qualification would make the enactment almost nugatory." The rule must be applied wherever it is applicable, and the Courts should not speculate on the intention of the testator(z).

Under the English Statute, 7 Will. 4 & 1 Vict. c. 26, sec. 29, the construction is complicated if the bequest is of real estate or of personal estate and the Statute will not apply "if a contrary intention shall appear by the will."

(v¹) (1944) 1 Ch. 268 at p. 268.

(w) 15 Bom. L. R. 352.

(x) 39 Bom. 296; 17 Bom. L. R. 197, (see also *Damodardas v. Dayabhai*, 22 Bom. 833).

(y) *Times of India* 27-8-1940; Judgment of Kania J., in suit No. 431 of 1940 (on 15-8-1940).

(z) *Narendra Nath v. Kamalbasini*, 23 I. A. 18.

Examples.

(a) A testator bequeathed a legacy to K with a proviso that "if after the expiration of nine years from my death K should die without a son or grandson then M, shall get the legacy." K survived the testator. *Held* K took absolutely and the gift over failed(a).

(b) A bequest is made to D on his attaining majority, but if he died childless the property was to go to charity. D survived the testator and attained majority but died childless. *Held*, D took absolutely and the gift over failed(b).

(c) A bequest is made by a testator to his children E, L and T for their respective lives and afterwards for their respective children, provided if any child died without leaving a child entitled to take under the will, the share of such child should go to their "then surviving" brothers and sisters if more than one in equal shares, and if only one, then to him or her absolutely. E, L, and T all survived the testator. E died first leaving children. Then L died without issue, leaving T surviving. E's children claimed a share in L's share. *Held*: children of E took no part of L's share. The words "then surviving" must receive its natural and ordinary meaning(d).

"Die under the age of 18."

Generally if there is a gift to A with a gift over in the event of his dying under age, the following rules apply :—

(1) If A dies under age in the lifetime of the testator, the gift over takes effect.

(2) If A dies after attaining majority in the testator's lifetime, the gift over does not take effect. (Ill. iii).

If there is a gift "at" or "upon attaining twenty-five" with a gift over in the event of the legatee dying under twenty-one, the gift is vested at 21 and the gift over will not take effect(e). If the gift is at 24, with a gift over in the event of the legatee dying under the given age without leaving issue, the gift over will not take effect if the legatee dies at whatever age leaving issue, [Halsbury, Vol. 34, p. 385 (foot-note m)]. So also a gift after a life interest to the children of the life tenant at 21 with a gift over in the event of the life tenant dying without leaving issue has been held to be vested at the death of the life tenant but not before(f).

"Die in my lifetime."

The words "die in my lifetime" point to futurity. Therefore if the legatee was already dead at the date of the will this expression would not apply to him(g). But in *In re Booth's Will Trust*(h) these words were construed as though they were "shall be dead or shall die."

"Die without leaving Child or Children."

In Jarman on Wills 7th Edn. Vol. III p. 1698 the following rule has been stated. "Where land is devised to A absolutely subject to a gift over in the event of his dying and leaving no child or children, child or children is read as meaning "issue" so that the gift does not take effect if A leaves issue living at his death. In Theobald on Wills, 9th Edn. at p. 589 it is stated that in many cases where an estate in fee is given followed by a gift over in the event of the devisee dying without children the word "children" has been construed as synonymous with "issue." But this rule was stated to be too wide(i). It was observed in *Re Thomas Milward* that the authorities do not lay down the wide proposition of law that in all cases the words "child or children" should be read as "issue." In each case it is a question of construction of the will as a whole.

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| <p>(a) <i>Monohur Mukerjee v. Kasiswar Mukerjee</i>, 3 C. W. N. 479.</p> <p>(b) <i>Bashist v. Sia Ramchandra</i>, 15 Pat. 18.</p> <p>(d) <i>Inderwick v. Tatchell</i>, (1903) A. C. 120.</p> <p>(e) <i>Doe v. Moore</i>, 14 East 601.</p> <p>(f) <i>Bree v. Perfect</i>, (1844) 1 Coll. 128.</p> | <p>(g) <i>In re Walker, Walker v. Walker</i>, (1930) 1 Ch. 469.</p> <p>(h) (1940) W. N. 114 (see also <i>In re Birchall, Kennedy v. Birchall</i>, (1940) W. N. 88).</p> <p>(i) <i>In re Thomas Milward</i>, (1940) 1 Ch. 698.</p> |
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125. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.

Bequest to such of certain persons as shall be surviving at some period not specified.

Illustrations.

(i) Property is bequeathed to A and B to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(ii) Property is bequeathed to A for life, and, after his death, to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

(iii) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(iv) Property is bequeathed to A for life, and, after his death, to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

(This is sec. 112 of the Succession Act X of 1865. It applies to Hindus, etc.)

The corresponding section in the Transfer of Property Act is section 24.

The rule laid down in this section is taken from *Cripps v. Wolcott*(j), and it is as follows :—that if a legacy be given to two or more equally to be divided between them or to the survivors or survivor of them and there be no special intent to be found in the will, then the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivor at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life and the survivors at his death will take the whole legacy, see illustrations (i) & (ii).

Survivorship.

The word “survive” refers to the longest in duration of lives running concurrently. It may, however, refer not to concurrent lives but to the fact of living after a named event or person. (See Halsbury, Vol. 34, p. 279). The word “period” used in this section does not mean an indefinite period after the testator's death but the lawful period for the distribution of the estate. “Before the period” means before the commencement of such period(k). In Illustrations (i) and (ii) the two lives A and B run concurrently, and as the period of payment is not specified in the will, the time of payment is the death of the testator, and he who survives the testator will get, i.e., if A dies before the testator and B survives the testator, B has lived longer in duration and, therefore, he gets the legacy. But if A and B both die in the lifetime of the testator, although A may die first and B afterwards, then the legacy will lapse under section 105. Ill. (ii) fixes the period at the death of the life tenant.

If survivorship, however, refers to the fact of living after a named event or person, e.g., as in illustration (iii) to A for life and after his death to B and C equally or to survivor, the period of payment is the death of the tenant for life. If B does

(j) 4 Madd. 11.

(k) *Bashist Narain v. Sia Ramchandra*, 12

not survive A but C survives, C will get the legacy. But if both B and C die before A, then section 181 will come into operation, the object of survivorship having been frustrated, it cannot take effect and the original bequest to B and C will remain and the representatives of B will take half and the representatives of C will take the other half, (see *ills. iv. and v. to sec. 181*).

In illustration (*iii*) to this section although there is a life interest, the survivorship has reference to the death of the testator. As C has died in the lifetime of the testator, his interest lapses under sec. 105, and as B has survived the testator his interest becomes vested and indefeasible. Therefore even though B dies in the lifetime of A, the legacy will go to his representatives and not to his children.

In illustration (*iv*) the survivorship has reference to the death of the life tenant. Therefore, he who lives longer is the person intended to take the gift. Here B and C both die in lifetime of the tenant for life, but the last to die is C. The legacy goes to the representatives of C, and not to the representatives of B and C, half and half as in sec. 181 (*ill. iv*) because the testator has shown a contrary intention. Be it noted that section 181 is subject to, amongst others, section 125.

In *Camani v. Barefoot*(1) a testator gave life interest in certain property to his wife and after her death equally to his three children J, C and F, or "the survivors or survivor" of them. The will contained a residuary clause in favour of wife. J attested the will. All the three sons survived the wife. F filed a suit for declaration that as J was incapacitated from taking under section 67 by reason of his having attested the will he was entitled to a moiety of the property. It was held that the words "survivors or survivor" were intended for the contingency of any child dying before the testator and therefore J's share fell into the residue and did not go by survivorship.

CHAPTER XI

Of Conditional Bequests.

Bequest upon impossible condition. **126. A bequest upon an impossible condition is void.**

Illustrations.

(i) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

[This is sec. 118 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is 25.

Definition.—A conditional legacy may be defined to be a bequest, the existence of which depends upon the happening or not happening of some *uncertain* event by which it is either to take place or to be defeated, Roper on Legacy, 3rd Edn., Vol. I, p. 645. In addition to this there are other kinds of conditional gifts which are in the nature of onerous bequests, *e.g.*, a testator bequeaths "the remainder of my property to my son A subject to the payment by him to my son B £8 per week for life, to payment by him after the death of B of £6 per week to the widow of B during her life or until her remarriage." In such a case if A takes the legacy, he takes it subject to the obligation. A further question arises in such a case whether a charge is created on the residue for the payment of the weekly sum in favour of B. It was held in *In re Lester, Lester v. Lester*(m) that it only created

(l) 26 Mad. 488.

(m) (1942) W. N. 113.

a personal liability on A and no charge was created. No precise form of words is necessary to create a condition but when it appears that a condition was intended that intention must be carried into effect. Conditional bequests are not the same as contingent bequests. The word "contingency" has reference to the happening of an event; the word "condition" has reference to the doing or forbearance from the doing of some act.

Conditions precedent and subsequent.—Conditions are of two kinds—conditions precedent and conditions subsequent. The former precede the vesting of estate(n), the latter are to be performed after the estate has become vested and if not performed may, in many cases, cause interests already vested to be divested or to be altogether void. Where the condition is precedent the estate is not vested in the grantee until the condition is performed, but where the condition is subsequent the estate vests immediately in the grantee and remains in him till the condition be broken.

Whether a condition is precedent or subsequent must depend on the language in which it is framed and very little help can be derived from decided cases on the point. If the meaning of the context is that the condition requires something to be done which will take time, the argument is in favour of construing it as a condition subsequent. On the other hand, a condition which involves anything in the nature of consideration is in general a condition precedent. As a general rule, law favours the early vesting of estates and for that reason Courts will lean towards construing a condition to be subsequent rather than precedent, if there is ambiguity in the language(o). The established rule for the guidance of the Court in construing devisees of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness. In cases of doubt as to the nature of the condition, the presumption is in favour of treating the condition subsequent. In *Gagriel Tagonu v. Evan Adeleye(p)* a bequest was made to the son of the testator with the following words: "These devises shall take effect upon my son attaining the age of 25 years." It was held that the words "shall take effect" were not intended to impose a condition precedent but they related to the devise taking effect in possession, and the devise was construed as vesting at the death of the testator subject to divestment if the legatee failed to attain 25.

Secs. 126, 127, 128 relate to conditions precedent.

Secs. 129, 130, 131, 132, 133, 134, 135, 136 relate to conditions subsequent.

In this chapter on the subject of conditional bequest the rule of English law of construction as to conditions subsequent with or without gift over is done away with, (sec. 134). Whenever a condition subsequent is valid if accompanied with a gift over, it is equally valid without a gift over. By English law it is not so. If there is no gift over, the condition subsequent is disregarded, and the gift stands.

The Law Commissioners when enacting the Act of 1865 have observed as follows:—"On the subject of conditions we have deemed it right to abstain from introducing into India the very refined distinctions which the Court of Chancery has, in questions relating to personal property, borrowed from the Ecclesiastical Courts. We think that the words of the will should be adhered to where no condition inconsistent with law or morality is sought to be imposed; that all bequests made upon illegal, immoral, or impossible conditions should be void and that wherever the testator's wishes can be carried into effect, if expressed in

(n) *Sri Veerabhadra v. Chiranjivi*, 32 I. A. 204.
105.

(p) A. I. R. (1939) P. C. 123.

(o) *Smt. Dayamoyee v. Jatindra*, 63 C. L. J.

one way they ought to be permitted to take effect, if expressed in any other way; so that whatever he can do by a limitation he ought to be allowed to do by imposing a condition. It appears also to us that whenever a condition subsequent is valid if accompanied with a gift over, it ought to be valid, without a gift over and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat."

A testator may by his will freely attach conditions to his gifts with the limitations laid down in this and the next section, *viz.*, that the condition should not be impossible of performance and should not be contrary to law or morality. A condition also must not be vague. If it were vague it will be void for uncertainty. In *Nathalal v. Manek*(q) the testator by his will bequeathed his property to his wife for life and directed that "after her death it should be given to my brother's son if he remained obedient to my wife and attains to her affairs and renders service to her." During the widow's lifetime the nephew failed to carry out any of the conditions but claimed the property on the ground that the condition was vague and uncertain and was therefore void. This contention was negatived and it was held that the condition was not vague.

Impossible Condition.

A testator may attach to his bequest conditions provided such conditions are not impossible of performance, are not unlawful, or contrary to public policy, or in general restraint of marriage.

This section deals with impossible conditions. If the condition is impossible of performance the gift is void. The impossibility may have arisen at the date of the will as in illustration (i) or subsequent. This section has reference to condition precedent. In the corresponding section of the Transfer of Property Act (sec. 25) the words are "dependent upon a condition" which makes it quite clear that that section refers to condition precedent only. The word "dependent" is not used in this section but the words are "upon an impossible condition" which mean the same thing.

A gift does not vest when there is a condition precedent which is impossible to perform or becomes impossible by act of God or from circumstances over which neither the legatee nor the testator had any control or by the act of the testator himself. In illustration (i) the condition that A shall walk 100 miles in an hour is a condition precedent. In Illustration (i) to sec. 138, the condition that A shall walk 100 miles in an hour is a condition subsequent. If the condition is subsequent the gift takes effect and the condition is void. In illustration (ii) the condition is a condition precedent and it is immaterial whether A's daughter was dead to the knowledge of the testator or not, as the performance of the condition appears to be the motive of the bequest. In such cases even if A's daughter was alive at the date of the will but dies before the marriage could be solemnized, the impossibility will be a bar to the claim of the legatee(r). In *Rajendra v. Mrinalini*(s) a bequest was made upon condition that the legatee should re-excavate a certain tank. The testator himself subsequent to the will excavated the tank and the condition became impossible of performance. It was held that the bequest failed. But if the fulfilment of the condition precedent is rendered impossible by operation of law before the date of the will, then the condition is void and the gift remains(t).

Condition distinguished from Limitation:—A disposition which is in form capable of being construed as a condition will be construed as a limitation

(q) 46 Bom. L. R. 356.

(r) *Aislabie v. Rice*, 3 Madd. 256.

(s) 48 Cal. 100.

(t) *In re Thomas's Will, Powell v. Thomas*, (1980) 2 Ch. 67.

if that appears to be the testator's intention. Thus if a testator bequeaths a life interest in certain property to a single woman with a proviso for its cesser in the event of her marrying, this will generally be construed as showing an intention to provide for her while she is unmarried and not as a condition in restraint of marriage, (Jarman on Wills, 7th Edn., p. 1436). In *In re Moore(u)* where the testator had made a provision for his sister "during such time as she may live apart from her husband" was construed as a limitation and not an illegal condition.

Bequest upon
illegal or immoral
condition.

127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Illustrations.

(i) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(ii) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

[This is sec. 114 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is section 25.

Conditions against Public Policy.

Conditions against public policy or public morality are those as to which the state has or may have an interest that they should remain unperformed or unfulfilled. Ill. (i) is an example of condition void as against public policy. Ill. (ii) is an example of condition void against public morality. Ill. (ii) is in support of sanctity of marriage. Similarly inducing or facilitating or encouraging married couple to divorce each other are viewed with disfavour by Courts of law as being against public policy. In *re Caborne(v)* a testatrix bequeathed the residue of her property to her son absolutely with a proviso that "if his present wife shall be alive and married to him the absolute gift to him.....shall be modified in such manner that he should have an interest for life only..... but so that if at any time during the life of my said son his said wife shall die or his said marriage be otherwise terminated, the absolute gift hereinbefore contained shall take effect as from such event." It was held that the provision was designed or intended to encourage an invasion on the sanctity of marriage bond and was therefore void against public policy.

The determination as to what is against public policy or public morality varies from time to time. This section applies if the condition is precedent. If the condition is subsequent, the condition is rejected and the gift is good.

The case of *Egerton v. Earl of Brownlow(v)* is an example of subsequent condition void against public policy. In that case property was given to Lord Alford with a proviso that if Lord Alford died without acquiring the title of the Duke or Marquis of Bridgewater then the estate was to cease. It was held by the House of Lords that the condition was against public policy and was void and the heirs of Lord Alford were entitled to the property without any condition.

Conditions against Public Morality.

Conditions as to Religion.—A condition of forfeiture in case the legatee embraces a peculiar faith, or marries a person embracing a peculiar faith, or marries a domestic servant is not against public morality(x). In *In re Hewitt, Hewitt v.*

(u) 39 Ch. D. 116.

(v) (1943) 1 Ch. 224.

(w) (1853) 4 H. L. C. 1.

(x) *Hodgson v. Halford*, 11 Ch. D. 959; *Perrin*

v. Lyon, 9 East 170; *Jenner v. Turner*, 16 Ch. D. 188. See, also, *Pulitai v. Sorabji*, 25 Bom. L. R. 1099.

Hewitt(y) a testator bequeathed his property to E for life "or until she shall take the veil." At the time of the will the testator was aware that E contemplated becoming a nun, and that such step would involve her taking a vow of poverty. E became a nun in 1913 and the testator died in 1920. It was held that the gift failed. In *In re May, Eggar v. May*(z) a testatrix bequeathed £5,000 to M for life "provided he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of 12 months after my death until he shall after my death become a Roman Catholic." M was a minor at the death of the testator but had been baptized as a Roman Catholic. It was held that M was not a Roman Catholic while he was a minor but as he had adhered to the Roman Catholic Church after attaining majority and at the age of 24 he was still a Roman Catholic, he had forfeited his interest in the legacy.

In *H. A. Gallope v. Ma In*(a) a bequest was made by the testator to his son with the following words, "but should my son form matrimonial alliance with any but a Roman Catholic he shall forfeit his inheritance and the property so forfeited shall go to my wife." The son married a girl who was baptised as a Roman Catholic on the day of her wedding which was performed according to Roman Catholic rites but the girl did not know the Ten Commandments and she could not say prayers. It was held that the son had fulfilled the condition. In *In re Morrison's Will Trusts, Walsingham v. Blaithe*(b) the gift was to a class with a provision that if any of the legatees became a Roman Catholic, the legacy should be forfeited. It was argued that the condition was void, because it might operate at a point of time beyond a period of time measured by a life or lives in being and the period of 21 years and might infringe the rule against perpetuities. But that argument was negatived. It was held that the clause in the will was capable of being applied separately to the interests of that legatee who took a benefit in the legacy and if he or she did the prohibited act and must do it within the perpetrating period then the condition was valid. In that case a legacy of £5,000 was bequeathed to A for life and after A's death the corpus to all the children of A with the proviso for forfeiture. A and all of her children became Roman Catholics and it was held that the interest of A and the interest of all the children of A was forfeited from the date on which A became a Roman Catholic.

In *re Blalberg's Will Trusts* which is unreported (but which is referred to in *Re Blalberg*(c) the testator by his codicil declared that, if any son, daughter or grandchild of his or the widow of any son of his should cease or fail to profess or intermarry with any person who should not profess the Jewish faith there was to be a forfeiture. Farwell, J., held that the expression "cease or fail to profess" was void for uncertainty. He observed, "It seems to me that the phrase 'cease or fail to profess' is a term capable of many meanings, and it would be impossible in my judgment in many cases to determine with any certainty whether a person had or had not ceased or failed to profess. Whether a person who while outwardly professing to be a member of the religion, in fact was not a member of it, would forfeit under this clause, I know not, and it would I think be impossible to ascertain."

In *In re Blalberg* Morton, J., had to deal with a clause contained in another codicil which was, "And I do hereby declare that should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith such a child or grandchild shall forfeit," etc. Morton, J., also held that the phrase "not of Jewish faith" was too vague to be enforced. "It seems to me that while 'professing' a faith may be a matter of outward

(y) (1926) 1 Ch. 740.

(z) (1932) 1 Ch. 99. (See also *Nicholls v. Public Trustee*, 19 Aus. L. J. 324.)

(a) 7 Ind. Rul. Rang. 61.

(b) (1940) 1 Ch. 102; (1939) W. N. 379.

(c) (1940) Ch. 385.

observance, the question whether a person is 'of Jewish faith' or not is a matter which lies in his or her conscience and is a matter of belief. Supposing, for example, that the marriage had taken place in a synagogue, to my mind that would not establish that the other contracting party was of the Jewish faith. In my view it depends on whether he holds or does not hold certain beliefs. The question, "does a particular man hold those beliefs is not to my mind a matter which a Court can ascertain with certainty." It was accordingly held that the clause was too vague and was void for uncertainty and that the forfeiture had not been incurred. This case was followed *In re Donn's Will Trusts, Donn v. Moses(d)* where the words were "If any child of mine shall intermarry with any one not of the Jewish faith or if any child of mine shall intermarry with any one whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying with any child of mine or if such last mentioned person shall at any time previous to such marriage have been of any faith other than the Jewish faith" then and in any such case during the life time of such child one-half of the income of such child's share was given over to the shares of the other children. Seven children survived the testator. Two of them subsequently married persons who did not claim to be the members of Jewish faith. It was held that the condition of forfeiture was void for uncertainty. But *In re Evans(e)* Farewell, J., distinguished the case of *In re Blaiberg*. In this case the forfeiture clause referred to a child or grandchild becoming a convert to the Roman Catholic religion. It was held that the clause was valid on the ground that conversion was an overt act which could be ascertained with precision. His Lordship observed, "The ground upon which I came to the conclusion which I did in *In re Blaiberg* and, I think, the ground upon which Morton, J., based his decision was that there the forfeiture clause was contemplating a state of mind and that that was something which the Court could not ascertain with any certainty."

In *In re Samuel, Jacobs v. Ramsden(f)* the Appeal Court overruled *In re Blaiberg* but the decision of the Appeal Court has been reversed by the House of Lords(g). In that case a testator settled for the benefit of his unmarried daughter and her issue a share of the residue with a proviso that if "my said daughter Edna shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then as from the date of such marriage all the trusts, powers and provisions in this my will contained and at that date subsisting and capable of taking effect thereafter in favour of (a) my said daughter contracting such marriage or (b) the person with whom, she shall contract such marriage or (c) any child or children thereafter to be born of her or (d) the issue of any such last mentioned child or children, shall cease and determine and be no longer exercisable and this my will shall thenceforth operate and take effect as if my said daughter had died at the date of such marriage." After the death of the testator the daughter married a man who was not of Jewish parentage or faith. On appeal Lord Greene M. R. held that the conditions were not void for uncertainty, but operated to effect a forfeiture. In delivering the judgment Lord Greene M. R. observed that "the testator in this case, like many other testators has attempted to direct the lives of his children from the grave. Such a thing is distasteful to people and I can well understand the desire of a Court to escape from such a result if the language used and the law applicable so permit." On the expression "of Jewish parentage" his Lordship referred the same to religion but he expressed no opinion on the question whether the words were too vague if they referred to race and not to religion. He observed, "In my opinion, however, the context points rather to the fact that the testator was thinking not of race

(d) (1944) 1 Ch. 8; (1943) W. N. 227.
(e) (1940) Ch. 629.

(f) (1942) 1 Ch. 1; (1941) W. N. 192.
(g) *Clayton v. Ramsden*, (1943) A. C. 320.

but of religion.....It is obvious from the requirements which he lays down for the husband that it is a religion of which he is thinking and that he wishes his daughter to marry into the Jewish religion."

With regard to the expression "of the Jewish Faith" His Lordship observed : " In my judgment an expression of this kind in such a context as this is not to be construed by reference to sectarian disputes or theological arguments or to degrees or zeal in performance of religious duties or attendance at religious ceremonies. A much more practical test appears to me to be required. *Prima facie* the question falls to be answered out of the mouth of the person in question. Religious faith is a matter so serious that it is to be assumed that in the normal case a person who is asked whether or not he is a Jew by religion will give a perfectly conscientious answer. Mr. Vaisey drew an alarming picture of this lady surrounded, like Penelope, by a crowd of suitors, but condemned to perpetual spinsterhood because she would be unable to know whether or not marriage with any one of them would enable her to enjoy the advantage of a romantic union without forfeiting the solid benefit of a settled income. I should have thought that the lady in such a situation could resolve the question very simply by asking the gentleman, and, if he answered "yes" I should have thought that *prima facie* that was enough. At any rate I feel certain that the correctness or otherwise of the proposed husband's confession of faith would not fail to be ascertained by calling in a rabbi to cross-examine him with regard to the tenets of the faith with a view to finding out whether he was an orthodox Jew, a reformed Jew or a liberal Jew.....If a man, when asked a serious question of this kind, whether in a drawing room or in the witness box answers : "I am a Jew by faith" that I should have thought was the most cogent evidence that it was to that religion that his adherence was devoted be it zealous or lukewarm, be it wide enough to cover any strict and orthodox tenet of the faith or of a looser or more easy going description. Whether or not a person who was born of a Jew and alleged that he was a Jew had repudiated his religion could be established by the evidence without much difficulty." This decision was reversed by the House of Lords. Lord Russel in delivering judgment expressed : "In my opinion on construction the words 'of Jewish parentage' refer to race." As to whether both parents must be of Jewish race His Lordship felt doubt in construing them. "The testator has given no information or clue as to what parentage or proportion of Jewish blood in the husband will satisfy the requirement that he should be of Jewish parentage.....It is this uncertainty of degree which prevents the divesting event from being seen precisely and distinctly from the beginning and which makes this condition void for uncertainty. The uncertainty attaching to the requirement of Jewish parentage avoids the whole condition subsequent, with the result that no defeasance takes place." Lord Romer also expressed a doubt whether the expression "of Jewish parentage" referred to race or religion. "In my opinion the words refer to race and not to religion or faith." With regard to the word 'parentage' "I am disposed to think its primary meaning, when coupled with a word indicating nationality such as Jewish, English, French or the like is race or descent." In their Lordships opinion if one of the two qualifications required in a permissible husband is expressed in such uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void, for it is a composite qualification that is required, and, it cannot be said of an individual that he possesses the part of the composite qualification, he cannot be said to possess the whole.

On the construction of the expression "Jewish faith" also their Lordships were of opinion that it was void for uncertainty. The appeal was allowed and it was held that no forfeiture was incurred. Lord Russels' observations as to the

framing of conditions of defeasance may be quoted, "The Courts have always insisted that the conditions of defeasance, in order to be valid should be so framed that the person affected (or the Court if they seek its guidance) can from the outset know with certainty the exact event on the happening of which their interests are to be divested. That principle was enunciated in *Clamer v. Ellison(h)* in the following words: "Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine." Following *Clayton v. Ramsden*, the condition was held void for uncertainty in *In re Moss's Trusts(i)*.

Conditions in restraint of Marriage.—Formerly all conditions in restraint of marriage were regarded as illegal and legacies were discharged of such conditions whether precedent or subsequent. Now it is settled that conditions which impose an absolute restraint of marriage are void, but if the restraint is reasonable, *e.g.*, not to marry under twenty-one, or without the consent of a certain person, and the like, such conditions are valid. Also a bequest to a person until that person marries and when he marries, then over, is a valid bequest, especially in case where the bequest is to a widow(*j*). Also a bequest to a single woman with a proviso for its cesser in the event of her marriage is good, the condition being construed as a provision for her while she remains unmarried (*Jarman on Wills, 7th Edn., p. 1486*). In *In re Lanyon, Lanyon v. Lanyon(k)* a bequest on condition that the legatee should not marry a relation by blood, was held to be void as a probable prohibition of marriage.

With regard to conditions requiring marriage with the consent of certain persons, see commentary to sec. 128.

Gift to Mistress.—If a bequest is made in consideration of the legatee living with the testator as his mistress it is void(*l*). But if the bequest is made in consideration of past relations the bequest is good(*m*).

Condition on the Legatee being of good Character.—In *Manu Lal v. Lachman(n)* a testatrix by her will bequeathed all her property to X and added that X will have no right to commit any act which would encumber or cause loss to the property and if X turned out to be of immoral character the property was to go to charity and X would forfeit the bequest. It was held that X was not of immoral character and he did not forfeit the bequest by mortgaging the property and the provision against alienation was bad in law.

Condition making interest Determinable on Insolvency.—Note the difference between the Transfer of Property Act, sec. 31 and sec. 131 on this subject. Sec. 31 of the Transfer of Property Act corresponds with sec. 131 of this Act, *i.e.*, under both the Acts a bequest or transfer may be made with conditions superadded that it shall cease to exist in case a specified uncertain event shall or shall not happen. But sec. 31 of the Transfer of Property Act is subject to sec. 12 of that Act under which a condition making the interest of the grantee determinable on his insolvency is void. There is no corresponding section in this Act. It would, therefore, appear that a condition making the interest of the legatee determinable on his insolvency would not be void. (See *ill. vii., sec. 120*). It appears that both in England as well as in this country a testamentary bequest to a person defeasible on his becoming insolvent is valid. As regards transfer *inter vivos*, sec. 12 of the

(h) 7 H. L. C. 707 at p. 725.

(i) (1945) W. N. 16.

(j) *Flossie C. Cohen v. Obediah A. Cohen*, 59 Cal. 102.

(k) (1927) 2 Ch. D. 264.

(l) *Tayamma v. Sitaramasami*, 23 Mad. 613.

(m) *Ram Sarup v. Bela*, 6 All. 313 (P. C.).

(n) A. I. R. (1932) A. 472.

Transfer of Property Act is a departure from this rule. The rule is also a departure from the English rule which sanctions such conditions, as such a provision appears to be a common forfeiture clause in English conveyances. But the provisions of the Bankruptcy Act in England and the Insolvency Acts in India may make such conditions void, if the effect of such condition is of defeating or delaying the claims of the creditors.

In *Nathalal v. Manek(o)* a bequest was made by the testator to his wife for life and "after her death it should be given to my brother's son if he remained obedient to my wife and attends to her affairs and renders service to her. During the widow's lifetime the nephew failed to carry out any of the conditions but claimed the property on her death. It was held that the condition was not void for uncertainty and as the nephew had failed to perform the condition the bequest failed.

If the bankrupt's interest is made to cease on his bankruptcy, but before the first payment becomes due the bankrupt obtains an annulment order, the forfeiture is not incurred(*p*). In *In re Forder, Forder v. Forder(q)* a bequest was made to A for life and after his death to B and C with a proviso that in the event of any beneficiary becoming bankrupt such beneficiary should forfeit his interest. B became bankrupt in 1914. A died in 1925 and the bankruptcy was annulled in 1926. It was held that as the forfeiture was complete, the annulment had no effect. If the annulment order was made during the lifetime of A it would have been different. In *Re Walker(r)* a bequest was made to L for life "until he shall assign charge or otherwise dispose of it or should become bankrupt" and then to the children of L equally. At the date of the death of the testator L was adjudicated insolvent but had applied for his discharge. An order suspending discharge for one month was made and it took effect after the testator's death. It was held that the forfeiture had been incurred and the children of L became entitled to the bequest. (See also Mulla's Law of Insolvency, pp. 335-338).

128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent to vesting of legacy.

Illustrations.

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D, to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(o) 46 Bom. L. R. 356.

appeal (1927) W. N. 184).

(p) *Hormusji v. Dadabhoy*, 20 Bom. 310.

(r) (1939) 1 Ch. 974.

(q) (1927) 2 Ch. 291; (1927) W. N. 12 (in

(vi) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

[This is sec. 115 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 26.

Performance of Conditions Precedent.

With respect to the performance of conditions the general rule is that in case of a condition precedent, if the condition is performed *cy pres* as it is termed, that is to say, if it has been *substantially* complied with, it will be sufficient. But where there is a condition precedent to the vesting of the interest of a devisee and on his failing to perform the condition *the property is given over* that condition must be complied with strictly. (Williams on Executors, 12th Edn., p. 819). With regard to conditions requiring a consent to marriage, the Court may hold a condition satisfied when it has been complied with substantially, though not in terms, whether the condition is precedent or subsequent but in case of a condition subsequent when there is a gift over the condition must be strictly performed.

Conditions as to Consent to Marriage.

With regard to the conditions requiring marriage with the *consent* of certain persons, either executors, trustees, or others, it has been decided that such consent must be obtained before or at the marriage and not afterwards. Consent obtained subsequently will not be a performance of the condition (ill. v), and the consent of all the executors, trustees, or other persons whose consent is required must be obtained, if they are in existence; a consent of the majority is not sufficient, (ill. iii). Where a bequest was made to a person on the condition of his marrying with the consent of his parents and one of the parents had died and the legatee married with the consent of the surviving parent, the condition is complied with, (ill. ii).

A general consent to any marriage is sufficient(s) and a consent once given without any condition cannot be retracted from caprice or some bad motive unless the consent was obtained through fraud or deceit(t), (ill. iv). A consent may be conditional. A consent may also be implied as from the circumstance that the person whose consent was required was present or sends a present at the marriage, (ill. i). If the legatee marries in the lifetime of the testator with his consent that is sufficient(u), (ill. vi). The condition is complied with by a *first* marriage and does not extend to a second marriage contracted without the consent of the person whose consent is required in the condition(v). (See ill. ii., sec. 132). If a bequest is made to a legatee at 21 or upon marriage with consent, with a clause for forfeiture upon marriage without consent, if the legatee attains 21, the condition is extinct and a subsequent marriage without consent is no forfeiture(w). (See also ill. iii to sec. 132).

If the legatee takes such a step as renders impossible or indefinitely postpones the performance of the act required of him the legatee forfeits the legacy, (sec. 136). For example, a bequest is made to A on the condition that he marries B's daughter. If A marries a stranger, he forfeits the legacy. This is not in consonance with the English law on the subject. In *Lester v. Garland*(x), a testator gave certain legacies

(s) *Mercer v. Hall*, 4 Bro. C. C. 326.

(t) *Dashwood v. Peyton*, 18 Ves. 27.

(u) *Chapman v. Perkins*, (1905) A. C. 106.

(v) *Crommelin v. Crommelin*, 3 Ves. 227.

(w) *Desbody v. Boyvill*, 2 P. Wms. 547.

(x) 15 Ves. 248.

to J and M and added, "if either of these girls should marry into the families of G or R and have a son, I give all my estate to him for life (with remainder over), and if they shall not marry" then the same was given to other person. J and M married into other families. Lord Thurlow held that nothing vested in the devisees over while the performance of the condition by J and M was possible *which was during their whole lives*; and that their having married into other families did not preclude the possibility of their performing the condition as they might survive their first husbands. In *In re Hanlon, Heads v. Hanlon*(y) a testator bequeathed his residuary estate upon trust to his wife for life and then to his two children a son and a daughter equally provided that if the daughter should marry A or live with him as his wife or misconduct with him or be delivered of a child by him then the bequest to her "shall be absolutely void and forfeited and she should be deemed to have died in my lifetime as a single woman." The daughter survived the testator and was unmarried. It was proved that A had married another woman and had left the district and the daughter had not seen him. It was argued on behalf of the daughter that the proviso was *in terrorem* as there was no gift over and was ineffective and void. It was held that the doctrine of *in terrorem* applied only to conditions relating to marriage and disputing will and not to other conditions to which the daughter was subjected, and that so long as A was alive the trustees could not pay the share of the residue to the daughter and there was an intestacy as to the daughter's share.

A condition whether precedent or subsequent with the consent of a named person is generally construed as operative only during the life of the named person. If that person dies in the lifetime of the testator or before any marriage, the gift takes effect if the condition is subsequent, (Halsbury, Vol. 84, p. 115).

In the case of executors, trustees, guardians, etc., whose consent is requisite, on the death of one of the executors, trustees, etc., before the marriage of the legatee the consent of the surviving executor or executors is a sufficient performance of the condition, but if all the executors die before the marriage of the legatee a question may arise whether the right to give consent vests in the legal representatives of the last dying executor or whether it is confined to the executors named personally, and on this point Lord Eldon has laid down in *Grant v. Dyer*(z) that "The general course of decisions go to confine the power of giving or withholding consent to those who are personally named and *not* to extend it to their representatives." (Williams on Executors, 12th Edn., p. 829).

Another question on the subject of consent arises, whether the Court will interfere if the executors or trustees whose consent is required refuse to give their consent and the answer is the Court will interfere and direct an inquiry into the proposed marriage and as to its propriety and if the marriage should be found suitable it will direct a settlement on the legatee and the issue of the marriage(a). (Williams on Executors, 12th Edn., p. 831). Illustration (iv) indicates that if the person whose consent is required withholds the consent capriciously the condition is deemed to have been fulfilled. That illustration, however, indicates that the consent is once given, and then the consent is retracted capriciously. If the consent is withheld *ab initio* by the person unreasonably or capriciously, the Court will interfere. It is stated that if the consent is withheld from a corrupt, vicious or unreasonable cause the Court may interfere and may give the requisite consent if a trustee whose consent is required refuses either to consent or dissent (Halsbury's Laws of England, Vol. 84, p. 115 footnote c).

(y) (1933) 1 Ch. 258; (1932) W. N. 259; 148 L. T. 448. (a) *Clarke v. Parker*, 19 Ves. 1; *Goldsmid v. Goldsmid*, 19 Ves. 368.

(z) 2 Dow 73.

Another question that arises for construction in connection with marriage is as to whether the bequest is vested or contingent. In each case it is a question of construction. If the marriage is an essential element of gift it will be contingent; if it is merely a desire the legacy will be vested. In *Kumar Chandra v. Prasanna*(b) a gift was to daughters on marriage and it was held to be not conditional.

Condition as to Time of Performance.—Illustration (vii) forms an exception to the rule that a condition precedent will be considered as performed if it is substantially performed. A condition to execute a release within a prescribed time has generally been construed strictly (see ill. (vii) sec. 127). Not so according to English law where it is held sufficient if performed within a reasonable time(c). Where the testator has prescribed a period within which a condition must be performed, this period must be strictly observed, (Halsbury, Vol. 34, pp. 119-120), unless such performance is prevented by fraud in which case such further time shall be allowed as shall be requisite (see sec. 137).

129. Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Bequest to A and
on failure of prior
bequest to B.

Illustrations.

(i) A bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(ii) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and, if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

[This is sec. 116 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 27, paragraph (1).

Scope of the Section.—The rule laid in this section is taken from *Jones v. Westcombe*(d) where the devise was to a child *en ventre sa mère* and then over on the death of the child. The gift over took effect although the wife proved not to be eniente. The rule laid down in this section will not apply if the testator has expressed a contrary intention. Sec. 130 indicates an exception to this rule. Under the Transfer of Property Act the rule and the exception are embodied in one sec. 27. The second paragraph of that sec. corresponds to sec. 130. The rule laid down in this section is that if an ultimate gift is made to take effect on the failure of a preceding gift in a particular manner, but the Court can gather that the meaning of the testator is that the ultimate limitation should take effect on the failure of the preceding gift in any manner whatsoever, then, although the language in which the ultimate gift is expressed does not in terms apply to the event which had happened, the ultimate gift takes effect, and the particular manner of failure of the preceding gift is not a condition precedent to vesting, (Halsbury, Vol. 34, p. 376).

In such cases the Courts treat the intention of the testator as having been effectually fulfilled by regarding a clause of apparent condition as a clause of conditional limitation—a mere qualification annexed to the bequest—so as not to require as in the case of a gift on a condition that the very event must be strictly fulfilled, e.g., if illustration (ii) is compared with illustration (vii) to sec. 128, in both cases

(b) 15 C. W. N. 121 (P. C.) See, also, *Nufur Chuntra v. Rait in Mala*, 15 C. W. N. 66. (c) *Hollinrake v. Lister*, 1 Russ. 500. (d) (1711) Prec. Ch. 316.

the bequest is made on a condition that legatee shall execute a document within a specified period. In ill. (vii) to sec. 128, the condition is precedent and is required to be literally complied with. In ill. (ii) to sec. 129, the condition is subsequent with a gift over and is treated as a conditional limitation so as to give effect to the gift over.

This rule will apply where there is a prior particular interest given with the remainder to a person unborn and on the death of the donee in remainder or on his death under age there is a gift over. Here though the unborn person never came into existence and so could not literally fulfill the condition of dying or dying under age, it is inferred that the gift over is to take effect whenever it can do so in immediate succession to the prior limitation in the manner of a remainder. This is illustration (i).

This rule also applies in cases where a bequest is made with an obligation imposed on the donee to do some act with a gift over in default of performance; it is then inferred that the gift over is also to take effect if the donee dies in the testator's lifetime without having performed the condition. This is illustration (ii). It is taken from *Avelyn v. Ward(e)*.

“If the Prior Bequest shall fail.”—These words are important for they indicate that the prior bequest is valid and fails subsequently. If the prior bequest is void *ab initio* under sections 113 or 114, the subsequent bequest will also fail under sec. 116(f). In other cases where the prior bequest is valid but fails, the ultimate bequest is accelerated, e.g., in *Jull v. Jacobs(g)* there was a bequest to A for life and then to his children. The bequest to A failed as he had attested the will. It was held that the bequest to the children took effect. This case was followed on *Ajudhia v. Rukman(h)*.

Examples.

(1) A testator provided as follows:—“My wife is in the family way, should a son be born he shall be my heir on attaining proper age. In case my son dies minor my property shall go to my brother.” The wife gave birth to a daughter. Held: gift to brother took effect(i).

(2) A testator gives a life interest to a woman if she so long remains unmarried and directs that in the event of her marrying the property should go to B. The woman dies unmarried. The gift over to B takes effect(j).

(3) A made a bequest to a minor son, and on his death before attaining majority to the widow for life and then to the daughters. The widow died first and then the son died a minor. It was held that the bequest to the daughters took effect(k).

130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

When second bequest not to take effect on failure of first.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him, the bequest to B does not take effect.

[This is sec. 117 of the Succession Act X of 1865. It applies to Hindus, etc.]

(e) *Avelyn v. Ward*, (1750) 1 Ves. Sen. 420.

(f) *Ismail Haji v. Umer Abdoola*, 44 Bom. L. R. 263.

(g) (1876) 3 Ch. D. 703.

(h) 10 Cal. 482.

(i) *Okhoymoney v. Nilmoney*, 15 Cal. 282.

(j) *Eaton v. Hewitt*, 2 Dr. and Sm. 184.

(k) *Durga Pershad v. Raghunandan*, 19 C. W. N. 439.

The corresponding section of the Transfer of Property Act is sec. 27, paragraph (2) and illustration (b).

This section is an exception to the rule laid down in sec. 129, and the illustration is taken from *Underwood v. Wing(l)*. Where the intention has been expressed that the gift over should not take effect unless the prior gift fails in the particular manner stated in the will, then that intention must be given effect to. An illustration of the contrary intention was the case of *The Official Assignee of Madras v. Vedavalu(m)* when a bequest was made to the grandson or grandsons "who may be born to my son S within ten years after my death" and if no such grandson was born then the property was to be divided between the granddaughters equally after the death of my said wife." The testator died in 1897 and the grandson was born within ten years. The gift to the grandson was invalid under Hindu law being a gift to an unborn person. It was held that the gift to the granddaughter also failed.

131. (1) A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

Bequest over,
conditional upon
happening or not
happening of speci-
fied uncertain
event.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129, and 130.

Illustrations.

(i) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A dies under 18.

(ii) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

(iii) A sum of money is bequeathed to A for life, and, after his death, to B; but if B shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.

(iv) A sum of money is bequeathed to A and B, and if either should die during the life of C then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.

(v) A bequeaths to B the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

[This is sec. 118 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 28. The word "interest" in sec. 28, has the same meaning as the words "the thing bequeathed" in this section.

Sub-section (1). Defeasance Clause.

This section deals with the defeasance clause and not with repugnant provisions after an absolute grant. Section 138 deals with the repugnant provisions. The

distinction between a defeasance clause and a repugnant one is sometimes subtle, but the general principle of law seems to be that where the intention of the testator is to maintain the absolute estate conferred on the legatee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such a restrictive clause would be repugnant to the absolute grant and therefore void(n), but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over to be taken as valid and operative(o). In such a case the gift over takes effect whatever may be the nature of the property or of the act which is enjoined or prohibited (Jarman on Wills, 7th Edn., p. 1461). A clause may be a defeasance clause if on an express contingency happening the bequest is to determine. It may be a limited estate or an absolute one. There may be a termination of the bequest with or without a gift over and in the latter case the bequest so terminated would either fall into the residue or if the bequest so terminated is itself the residue, it will go as undisposed of to the heirs at law(p). It is quite competent to the testator to give an absolute estate subject to a condition of defeasance. In such cases the condition of defeasance is subject to the same limitations as a condition precedent excepting that the second bequest cannot take effect unless the condition is strictly fulfilled. This is provided by sub-section 2 which expressly omits sec. 128, viz., substantial compliance with the condition. In sec. 28 of the Transfer of Property Act also similar omission is made of section 26. The condition of defeasance must not also contain again a defeasance clause, e.g., a bequest to A subject to the condition that if he died without male issue then over to B with a similar condition that if he died without male issue to C subject to a similar condition. In such a case the whole condition is void and A will take the gift absolutely(q).

Sub-section (2).

In sub-section 2 are mentioned sections 122 and 123 (onerous bequests). It is not clear what is meant. In section 28 of the Transfer of Property Act, sec. 127 (onerous bequests) is not mentioned. In section 28 of the Transfer of Property Act, section 10 is mentioned but the corresponding section 138 of this Act is not mentioned in this section.

Illustration (i)

The bequest vests in A but as he is a minor it is not payable immediately. If A attains majority, B does not take anything. Similarly if a bequest is made to A for life and then to B on his attaining majority with a gift over to C if B died under age, the gift to C does not take effect if B attains majority, though he may die in A's lifetime(r). In ill. (i) there is an indication that if A does not attain the age prescribed in the will, the gift goes to B. But there are cases of wills where no such indication exists. In such a case the rule of construction is that the donee takes the property irrespective of such condition, (Halsbury's Laws of England, Vol. 34, paragraph 145).

Illustration (ii). Doctrine of in Terrorem

Condition not to dispute the will.—In England a condition that the legatee should not dispute the will or should not interfere with the management of the

(n) *Sures Chandra v. Lalit Mohan*, 20 C. W. N. 463.

(o) *Govindaraja v. Mangulam Pillai*, 63 Mad. L. J. 911 at 938; *Saroju Bala v. Jyoti-moyee*, 58 L. A. 270 at 277; *Radha Prasad v. Ramee Mani*, 35 Cal. 896 (P. C.).

(p) *Golak Behari v. Suradhani*, 68 C. L. J. 246.

(q) *Dhanlaami v. Hariprasad*, 45 Bom. 1038.

(r) *Ernest William v. H. S. F. Gray*, 48 Mad. L. J. 707.

testator's estate is considered valid in law unless it is so worded as to prohibit the legatee from taking any legal proceedings for the protection of his rights(s), such conditions, however, are considered merely as a sort of terror or as it is termed *in terrorem* to the legatee and will not operate as a forfeiture by the legatee disputing the will, unless there is coupled with this condition a gift over on breach of the condition, e.g., a legacy of £100 is given to A, provided A shall not dispute the will. A disputes the will but the will is held valid. A does not lose his legacy. But if the legacy of £100 is given over to B if A shall dispute the will, then A will lose his legacy if he disputes the will. (Halsbury, Vol. 34, p. 163). Illustration (ii) shows that such a condition is not valid, unless there is a gift over. But see sec. 134.

Sec. 134 gets rid of this rule. If the condition subsequent is valid, if accompanied by a gift over, it will be equally valid without a gift over and will not be considered as *in terrorem*. Hence in the above example A will lose his legacy in both the cases. In illustration (ii) to this section the words used are "if A shall dispute the competency of the testator to make a will" and not disputing the will. Under sec. 28 of the Indian Contract Act every agreement whereby a party is restricted from enforcing his right in a Court of law is void. It would seem, therefore, that the law laid down in *Re Williams*, *supra* would apply to India.

In *Cook v. Turner*(t) a condition in a will of real estate that if the devise should dispute the will or the testator's competency to make it or should refuse when required by the executors to confirm it, the disposition in favour of such devise should be revoked was held to be valid in law. This case was followed in *Soorjimonee v. Suddanand*(u).

Conditions Restraining the Legatee from Taking Legal Proceedings.—

In some cases the testators lay down the condition that if any of the legatees shall go to Court regarding the administration of the property left by the testator, he shall forfeit the bequest or that all the costs of the litigation should be recovered from the legatee. Such a provision in the will will not apply to an action by the legatee against the executors based on wilful default and if at all applicable will be void for repugnancy(v). Under sec. 28 of the Indian Contract Act every agreement restraining a party from enforcing his rights by the usual legal proceedings in Court of law is void. In *Rhodes v. Muswell Hill Land Co.*(w) the testator declared that if any dispute should arise relating to his estate it should be referred to arbitration and declared that if any devisee or legatee should commence legal proceedings the devise or bequest to him shall be void. Sir John Romilly M. R. observed, "I have no doubt that the clause of forfeiture has no more effect than if it had been altogether omitted from the will..... The testator says, I give you the property but if you resort to any proceedings whatever respecting it, even to secure its enjoyment, I give it to some one else; the thing is absurd. If a stranger got possession of the estate he would have this advantage the devisee could not take proceedings against him without forfeiting the estate, and the residuary devisee could not maintain an action against him until the forfeiture had occurred, so that between the two the wrongdoer by lapse of time and the forbearance of the devisee would acquire a good title. The consequence is that this provision is absurd, inconsistent and repugnant". In *Re Williams* (*supra*) a testator provided that in case any action or other proceedings for the administration of his estate by any beneficiary was commenced, the costs of all parties should be paid out of the plaintiff's share. It was held that this provision did not apply to an action based on the footing of wilful default. The jurisdiction of the Court in the construction of a will is not ousted by any discretion or recommendations

(s) *Re Williams*, (1912) 1 Ch. 399.

(t) 15 M. & W. 727.

(u) (1873) Sup. Vol. I. A. 212 at p. 219.

(v) *In re Williams*, (1912) 1 Ch. 399.

(w) 29 Beav. 560.

by the testator that the questions of construction are to be decided by arbitrators; and a direction that a beneficiary resorting to litigation for the purpose shall forfeit his interest is inoperative to the extent of preventing him from seeking the aid of the Court (Halsbury, Vol. 34, p. 162).

Condition as to Residence.—In a condition of residence when no manner or period is prescribed, exclusive residence is not supposed to be made and the occasional use of the house and keeping an establishment is a sufficient compliance(x). In *Shyama Charan v. Sarup Chandra(y)* a Hindu testator bequeathed his property absolutely to N with a proviso that he lived in the ancestral house; but if N or his son or other descendants failed to live in the ancestral house the property was to go to others. It was held that the condition of residence was not invalid; but as N concurred in selling the house he forfeited the legacy. In *Sifton v. Sifton(z)* a testator bequeathed to his daughter the income of his property with the following condition: "The payment to my daughter shall be made only so long as she shall continue to reside in Canada." The question raised was whether the residence in Canada was perpetual residence or only temporary and whether the direction was not void for uncertainty. It was held that the condition was a condition subsequent and void for uncertainty. Where residence in a particular place is condition of deprivation of legacy, non-residence to deprive the legatee must be wilful, deliberate and intentional(a). If there is a just cause for not living in the house, the Court will not insist on the condition(b).

A gift of the use and occupation of a house is a gift of the rents and profits and the donee need not personally reside in the home but he may let it(b¹). (See also Halsbury, Laws of England, Vol. 34, pp. 336-339.)

Illustration (iii)

A bequest to A for life and then to B makes the interest of B a vested remainder and if B dies in the lifetime of A, his legal representatives become entitled. This illustration prevents such legal representatives from taking the bequest and that can be done by a conditional limitation.

Illustrations (iv) and (v). Survivorship.

If there is a gift after a life estate to a number of persons in equal shares or alternatively to such of them as survive the life tenant, the surviving clause is *prima facie* a divesting clause only and if none of the donees survive the life tenant their representatives take in equal shares(c).

Hindu Law.—This section applies to Hindus but in stating the rule relating to defeasance of a prior absolute interest by a subsequent event it is important to note two qualifications, first, that the event must happen if at all immediately on the close of a life in being at the time of the gift and secondly that a defeasance by way of gift over must be in favour of some person in existence at the time of the gift or at the death of the testator as the case may be(d). These rules do not apply to cases governed by the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests Act, 1921. A Hindu may give property to a person not in existence under those Acts. In *Saraju Bala v. Jyotirmoyee(e)* it was held that a Hindu may give property by way of executory gift upon an event which is to

(x) *Tagore v. Tagore*, 14 B. L. R. 60; 1 I. A. 387; *In re Moir Warner v. Moir*, L. R. 25 Ch. D. 605; *Bhoba Tarini v. Peary Lal*, 24 Cal. 646; *Mulji v. Bai Ujam*, 13 Bom. 216.
(y) 17 C. W. N. 39.
(z) (1938) A. C. 666; A. I. R. (1938) P. C. 270.

(a) *Tincouri v. Krishna*, 20 Cal. 15.
(b) *Mulji v. Bai Ujam*, 13 Bom. 218.
(b¹) *Clive v. Clive*, 2 Eq. Rep. 913.
(c) *Akhoy Kumar v. Indira Rani*, A. I. R. (1931) C. 499.
(d) *Kristomoni v. Narendro*, 16 I. A. 29.
(e) 58 I. A. 270.

happen if at all immediately on the close of a life in being and such a gift over might be a sufficient indication that only a life estate to the first taker was intended.

132. An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless the condition is strictly fulfilled.

Condition must be strictly fulfilled.

Illustrations.

(i) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(ii) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(iii) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18 or marries without the consent of B, the legacy shall go to C. A marries under 18 without the consent of B. The bequest to C takes effect.

[This is sec. 119 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 29.

This section is based on the rule that conditions which tend to the destruction of the estate already vested are to be construed strictly and shall not be extended beyond their words. The very event must happen in order to deprive the legatee of his legacy. Ignorance of a condition annexed to the bequest is no excuse for not complying with it(f).

Original bequest not affected by invalidity of second.

133. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(i) An estate is bequeathed to A for his life with condition superadeed that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(ii) An estate is bequeathed to A for her life and, if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(iii) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and A is entitled to the estate during his life.

[This is sec. 120 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 30.

The rule laid down in this section is in contrast with the rules laid down in sections 126 and 127. If a condition precedent is void on the ground of impossibility, illegality or immorality, the gift is void; but if the condition is subsequent, the condition is rejected and the gift remains valid. The general rule is that an absolute interest is not to be taken away by a gift over, unless the gift over may itself take effect(g). The illustrations to this section indicate the three types of illegality. In illustration (i) the condition is an impossible condition, in illustration (ii) the condition is immoral and in illustration (iii) the condition is illegal.

(f) *In re Hodges Legacy*, 16 Eq. 92; see also (g) *Dhanlaxmi v. Hariprasad*, 45 Bom. 1038. *Re Quinton*, (1926) 1 Ch. 992.

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen, or not happen.

134. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(i) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood. He loses his life-interest in the estate.

(ii) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to A for life, and, after his death, to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the life-time of A. She thereby loses her contingent interest in the fund.

[This is sec. 121 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 31. That section is subject to sec. 12, *viz.*, a condition regarding the insolvency of the donee. Such a condition would be void under the Transfer of Property Act but not under this Act. But otherwise the condition to be attached to the gift must be a legal condition, (see sec. 135). If the condition subsequent is illegal, the gift will be good and the condition void, sec. 133.

This section is a departure from English law, *viz.*, that a gift may be made coupled with a condition that on the happening or not happening of a specified uncertain event it shall cease, and that to effectuate the defeasance a gift over is not necessary as required by English law. According to this section if the condition subsequent is valid, if accompanied by a gift over, it will be equally valid without the gift over. In England it is treated as *in terrorem*. The condition referred to in this section is a condition subsequent which terminates an interest. It is not a conditional limitation which creates an interest in a third person(*h*). In *Veerabhadra v. Chiranjivi*(*i*), a condition was that the legatee shall humbly apply for subsistence allowance. The legatee wrote a letter to the executors demanding the legacy. It was held that the condition was not satisfied. In *Navalchand v. Manekchand*(*j*), a testatrix bequeathed her property to her daughter's son but the devisee was not to get the full ownership until he had a son or daughter 20 years old and if he died without children then over. It was held that the son took an absolute interest liable to be defeated if he died without ever having a son or daughter. In this case a question was raised that the first legatee taking an absolute estate should be restrained from alienating the property until the condition was fulfilled. The judgment is interesting on this point (see p. 453 of the Report) and the same is as under.—

“The question might arise what would happen if the legatee having an absolute estate liable to be defeated in the event of his dying without having had a son or a daughter dissipated the corpus of the estate during his lifetime. The ques-

(h) *Gogaldas v. Hemandas*, A. I. R. (1942) S. 145 at p. 152. (i) 28 Mad. 173 (P. C.). (j) 23 Bom. L. R. 450.

tions which have come before the Courts in the case of bequests of an absolute estate liable to be defeated have always arisen after the death of the donee of the absolute estate and our attention has not been directed to any case in the Report in which a question has arisen during the lifetime of the first donee as to whether he could be restrained in any way in dealing with the corpus. The idea of an absolute estate liable to be defeated is not one which appeals to one's ordinary common sense. The general idea in law is that the gift of an absolute estate implies that the donee's power of alienation cannot be restricted in any way. But though the law does recognise that an absolute estate can be brought to an end, it nowhere prescribes what restraints can be imposed upon the enjoyment of the owner of such an absolute estate while it is uncertain whether the event will happen which will cause it to be defeated. In the absence of any authority we must hold that there can be no attempt to restrain the power of alienation in this case."

An absolute interest may be defeasible in certain circumstances, but it cannot be cut down to a life estate by a gift over^(k). In *Golak Behari v. Suradhani Dass*^(l) the will contained the following clause, "After my death the abovementioned three sons of mine will become the Malik of the properties left by me in equal shares, . . . God forbid if any of my sons die without leaving any son, then his widow will not get any share of the property left by me but as long as she will live she will get such maintenance as my estate will permit". There was also a provision that if the sons left daughters only, they will not get any share. One of the sons died without leaving a son and his widow claimed one-third share contending that her husband got an absolute one-third share under the will and that she as his heir inherited the same and the subsequent clause was repugnant to the absolute gift. It was observed by Mitter, J., that where it is an absolute interest, "an estate of inheritance having been conferred on the legatee, and the contingency is one which is to happen, if at all, the moment the legatee dies and not earlier, that intention would be necessarily implied, if at that moment of time the legatee's absolute estate is cut down by the words used by the testator to a life estate, for with the death of the legatee all his interests determine, nature doing the final act. An absolute interest so conferred can only, when there are no express words of conversion into a life estate, be cut down to a life estate if the quality of heritability be destroyed and that can be done by the exclusion of all the heirs of the legatee then living." In the will in question two only out of a large number of the possible heirs were deprived by the testator and, therefore, the clause could not be construed as a defeasance clause and the widow was entitled to succeed.

According to this decision in order that sec. 134 should apply three conditions must be satisfied

- (a) The absolute estate should be reduced to a life estate.
- (b) It must not set up a line of inheritance not known to Hindu law.
- (c) It must not be repugnant to the grant of absolute estate.

"*Shall cease to take effect*".—These words mean that the bequest shall have no effect at all. It has the effect of completely destroying the bequest on the happening of a certain unspecified event or on a certain unspecified event not happening. It has nothing to do with a case where a gift absolute is merely modified or curtailed.

(k) *Govindbhai v. Dahayabhai*, 38 Bom. L. (l) 68 C. L. J. 246; A. I. R. (1939) C. 226. R. 175.

135. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Such condition must not be invalid under section 120.

[This is sec. 122 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 82.

To render valid a cesser clause and to divest the estate already vested, the condition contemplated shall be such a one as can be legally given effect to. The reference to sec. 120 is not quite intelligible, but it probably means that the contingency upon which the estate is made determinable must occur within the legal period, *e.g.*, perpetuity(*m*).

136. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act, if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.

Illustrations.

(i) A bequest is made to A, with a proviso that, unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

[This is sec. 123 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 33. This section may also be compared with section 34 of the Indian Contract Act which provides that where the event upon which a contract is contingent is the future conduct of a living person it shall be considered to become impossible when he does anything which renders it impossible for him to perform. Illustration (ii) is not in consonance with English law on the subject. In *Randal v. Payne*(*n*) it was held that a gift in case J and M did not marry into certain families did not become impossible of performance by their marrying into other families as they had their whole life to perform the condition.

Time within which the condition must be fulfilled when no time is specified.—This section lays down that where no time is specified for the performance of the act, in case where the condition is precedent, the condition must be fulfilled within a reasonable time. As to what is reasonable time will depend on the facts of each case. But where the condition is subsequent or is superadded—that unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or that the bequest shall cease to have effect—if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, he forfeits the legacy.

(*m*) *Anand Rao v. Adm.-General*, 20 Bom. 450. (*n*) 1 Bro. C. C. 65.

137. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

Performance of condition, precedent or subsequent, within specified time. Further time in case of fraud.

[This is sec. 124 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 34. As to the meaning of the word "fraud" see section 17 of the Indian Contract Act. The definition is not exhaustive. As a matter of fact no definition of the word is possible.

Time within which condition must be fulfilled when time is specified.

—The executor owes no duty to the legatee to give notice of the terms of the legacy even though he takes a beneficial interest in the legacy on the breach of the condition(o). If the performance of the condition within the time specified is prevented by fraud on his part, such further time will be given as the Court thinks proper. This section lays down that if the will requires an act to be performed by the legatee within a specified time either as a condition precedent or as a condition subsequent, the act must be performed within the time specified whether he knows of the condition or not, unless the performance of the act be prevented by fraud(p), (see also ill. vii., to sec. 128). Mere ignorance on the part of the legatee is no excuse, the principle being that a person who takes by gift under a will cannot plead want of knowledge as an excuse for not complying with its provisions(q). The act required to be done must be performed within the time specified(r). In some of the English cases, however, it has been held that if the legatee performs the act required within a reasonable time, though not within the specified time, he will be entitled to the legacy(s). If by the fraud on the part of the executor or any other person interested in the will, the performance of the act by the legatee is rendered impossible or indefinitely postponed then section 34 of the Transfer of Property Act provides that the condition shall be deemed to have been performed. There is no such provision in this section, but it is submitted the same would be implied.

Condition to assume Name.—In *Dinsmore v. Finlay*(t) the testator directed that no person should be entitled to a share in his estate unless he or she within 3 months after the testator's wife's death or after he or she attained 21 whichever should last happen assume the testator's name. H who survived the testator's wife had not adopted the testator's surname within 3 months of the death of the widow. It was held that the condition was a condition subsequent and as there was no gift over, the proviso was discretionary and not mandatory and the condition would be sufficiently complied with if the legatee adopted the name before the payment of legacy.

(o) *Re Lewis*, (1904) 2 Ch. 656.

(p) *Tin Cowri v. Krishna*, 20 Cal. 15.

(q) *Astley v. The Earl of Essex*, L. R. 18 Eq. 290.

(r) *Tulk v. Houlditch*, 1 Ves. & B. 248.

(s) *Taylor v. Popham*, 1 Bro. C. C. 168, *Simson v. Vickers*, 14 Ves. 341; *Re Packard*, (1920) 1 Ch. 596.

(t) (1933) N. I. 89.

CHAPTER XII

Of Bequests with Directions as to Application or Enjoyment.

138. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person

Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

[This is sec. 125 of the Succession Act X of 1865. It applies to Hindus, etc.]

The corresponding section of the Transfer of Property Act is sec. 11. This section refers to a restriction on the enjoyment of property. As regards condition in restraint of transfer or alienation of property such a restriction is also declared to be void under section 10 of the Transfer of Property Act; there is no similar section under this Act but the word "enjoyment" would include a power of alienation.

The word "fund" includes both moveable and immoveable property(u). In sec. 11 of the Transfer of Property Act the word is "interest". In this section the expression used is "the legatee shall be entitled to *receive the fund*;" in sec. 11 of the Transfer of Property Act the expression used is "he shall be entitled to *receive and dispose* of such interest".

Repugnant Conditions.—This section is based on the principle that a legatee ought not to be compelled by the Court to do that which he may undo the next moment(v); and that an unqualified gift will not be cut down by subsequent words unless they clearly have that effect(w). The doctrine of repugnancy is based on the principle that one cannot both give and withhold at the same time. In the words of Lord Cottenham in *Lassence v. Tierney*(x), "If a testator leave a legacy absolutely as regards his estate but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. Repugnant conditions are like illegal conditions subsequent void.

This section will not apply if the bequest is not absolute. It has nothing to do with the creation of trust. The condition precedent to the coming into operation of the section is that the fund is bequeathed absolutely to or for the benefit of any person. This section has no application to the case of a gift followed by a direction which amounts to a trust. In such a case the gift is not to the legatee absolutely but to him upon a trust which is nonetheless a trust because it is introduced by some such word as "direct"(y).

Sec. 138 does not apply where the bequest is of life interest only: The word "absolutely" qualifies not only the first part, viz., the word "bequeathed" but also the latter part "for the benefit of any person" (z).

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| <p>(u) <i>Mokoondo v. Gonesh</i>, 1 Cal. 104; <i>Putlibai v. Sorabji</i>, 25 Bom. L. R. 1099 (P. C.).</p> <p>(v) <i>Edwards v. Hall</i>, 11 Hare, 6; <i>Jehangir v. Kaikhusru</i>, 39 Bom. 296 (P. C.).</p> <p>(w) <i>Tripurari v. Jagat Tarine</i>, 40 I. A. 37.</p> <p>(x) 1 Mac. & G. 551.</p> | <p>(y) <i>Subas Chandra Bose v. Gordhandas</i>, 42 Bom. L. R. 89 at p. 113; (1940) Bom. 254.</p> <p>(z) <i>Kedar Nath v. Gaya Nath</i>, 52 C. L. J. 165 A. I. R. (1980) C. 731.</p> |
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If there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case the gift is only for a particular purpose; in the former the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee^(z). But where there is no absolute gift, the legatees can take no more than what is given(a).

On the same principle where a legacy is given for a particular purpose for the benefit of the legatee, e.g., to bind him apprentice(b), or to pay off a mortgage(c), or for maintenance and education(d), it is good though the purpose fails or becomes incapable of execution, and the legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is expressly given over(e). So also if a bequest is made to legatees but the division is restrained for a number of years the restriction is void as being a condition repugnant to the gift(f). Where some of the terms of the will seem to show that an absolute gift was intended, but the subsequent clauses show that only a life interest was intended, the last mentioned words instead of being regarded as repugnant will be construed that a life estate was intended(g). On the same principle when property is given to a wife for the support of herself and the children it is given for her benefit and her children and the Court does not inquire how it is applied unless the children are not supported at all. Such a question of construction arose in *Jogeswar Narain v. Ram Chandra Dutt*(h), where a Hindu bequeathed four-anna share in his Zamindari to his youngest widow and son "for your maintenance". It was contended that the widow's interest was a limited one but that argument was negatived and Their Lordships held that the widow took the gift absolutely, that the words "for your maintenance" were added for the purpose of enabling the widow and son to live in comfort and did not necessarily mean that the widow was given a bare right of maintenance. But when the children are otherwise provided for and do not require support or maintenance they are not entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education and support(i), and if the children attain majority the obligation to maintain ceases(j).

Examples.

(1) A testator bequeathed a portion of his property to his son and provided that if the son died without marrying or if married without any lineal heir, his share should go to his sisters or their heirs. *Held*, the son took absolutely and the restrictions were nugatory(k).

(2) A Hindu devised his property to his daughter and provided that she and her husband "should live in my house and maintain themselves and enjoy it but her Sasarias (relations of her husband) or her creditors have no right and if any issue be born it is the owner. *Held*, daughter took absolutely and the provisions were nugatory(l).

(3) A testator devised his estate, should his wife remain his widow, for the benefit of his wife and his children then living and any children that may be born to him of his said

(z) *Kellett v. Kellett*, L. R. 3 H. L. 160.

(a) *Savage v. Tyers*, (1872) 7 Ch. App. 356.

(b) *Barlow v. Grant*, 1 Vern. 255.

(c) *Lockhart v. Hardy*, 9 Beav. 379.

(d) *Webb v. Kelly*, 9 Sim. 469.

(e) *Adm.-General v. Apcar*, 3 Cal. 553.

(f) *Mokoondo v. Gonesh Chunder*, 1 Cal. 104;

Gordhandas v. Ramcoover, 26 Bom. 449;

Pudlibai v. Sorabji, 25 Bom. L. R. 1099

(P. C.) at 1101; *Adm.-General v. Money*,

15 Mad. 448; *Cally Nath v. Chunder Nath*,

8 Cal. 379; *Profulla v. Jagendra*, 9 C. W. N. 528.

(g) *Somasundara v. Ganga*, 28 Mad. 386.

(h) 23 Cal. 670 (P. C.).

(i) *Carr v. Living*, 28 Beav. 644 at 647; *Narayani v. Adm.-General*, 21 Cal. 683 at 696.

(j) *Natha Kerra v. Dhunbaiji*, 23 Bom. 1.

(k) *Sardar Nowroji v. Pudlibai*, 15 Bom. L. R. 352.

(l) *Chunilal v. Bhogilal*, 19 Bom. L. R. 980.

wife thereafter. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, but that after her death her children and their descendants should take *per stirpes*, and in the event of his wife not remaining his widow and her child or children being alive then to his children in equal shares. And in the event of his wife contracting a second marriage, and his children dying before such marriage and without leaving children, his wife should take half of his estate and the testator's brothers the other half. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held* that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift(*m*).

(4) A testator bequeathed his property to his son absolutely but directed his executors not to make it over to him until the son attained a certain age beyond the age of majority. *Held* that the direction was void unless the will conferred an interest in the property upon some person during the intervening period. The legatee was held entitled to the property on attaining majority(*n*).

(5) A Parsi having two sons P and J in clause 2 of his will gave his property half and half to them and appointed them his heirs. By clause 5 he provided that the management of the estate should be entrusted to J as P was of weak mind. The will further ran as follows: "At present P has no male issue. He has only a daughter. If P gets a male issue half of the estate be made over to him on his attaining full age." [Clause 11 prohibited alienation of the property and the will continued "If my son P does not get a son, J is to give his son as P's Palak (adopted son). All the clauses of this will are applicable to the adopted son." The testator died leaving P and J; J entered upon management of the property and obtained probate. P died leaving no son. J gave his son in Palak. Widow of P filed suit for construction. *Held*, when P survived the testator he took an absolute estate in half of the property and the directions as to management and his leaving a son were repugnant to the absolute bequest and were void, and that on P's death his share passed to his heirs(*o*).

(6) "If I die then my son's wife G is the owner of the above property. G shall during her lifetime spend and enjoy out of my property and as to whatever property may have remained over after her decease, her two daughters are the owners thereof". At the date of the will the testator had two grand daughters by G one of whom predeceased him and the other C survived him. Before the testator's death another daughter was born and survived him. *Held* that G took only a life estate with power of alienation in her lifetime by act *inter vivos* but not by will and P alone was entitled to the remainder(*p*).

(7) A testator gave his property to his two daughters as "owners" or Malik but provided that on their death their daughters shall be the heirs. *Held* that the daughter took the estate absolutely(*q*).

Condition in restraint of alienation.—Where the bequest to a legatee is absolute in terms but there is a condition restraining the legatee from spending, or disposing of, or alienating the subject of the bequest generally, the condition is void and the bequest is absolute(*r*). In other words, conditions which are repugnant to an estate already given are void, *e.g.*, where there is a devise in fee followed by an absolute restraint upon alienation(*s*). The intention to pass whole estate must be clearly expressed(*t*). If, however, there is a disposition of intermediate interest the restriction is not bad(*u*). Also a condition restraining alienation of property to a particular person or before a particular time or not to sell out of family is good(*v*). As regards conditions in partial restraint of alienation such a restraint is not repugnant. In *Mahomed Raza v. Mt. Abbas Bandi*(*w*)

(*m*) *Haliburton v. Administrator-General of Bengal*, 21 Cal. 488.

(*n*) *Husenbhoy v. Ahmedbhoy*, 26 Bom. 319.

(*o*) *Jehangir v. Kaikhusru*, 39 Bom. 296 (P.C.).

(*p*) *Mafatal v. Kaniatal*, 17 Bom. L. R. 705.

(*q*) *Partap Chand v. Makham*, (1933) Ind. Rul. L. 52.

(*r*) *Ashutosh v. Doorga*, 5 Cal. 438 (P. C.); *Gokool Nath v. Issur Lochan*, 14 Cal. 22 (P. C.).

(*s*) *Hood v. Oglander*, 34 Beav. 513; *Chimanrao v. Rambhau*, 4 Bom. L. R. 508;

Rojomoyee Dasset v. Troylukho, 29 Cal. 260; *Rameshwar v. Lachmi*, 31 Cal. 111; *Prevost v. Prevost*, (1908) A. C. 541; *Anantha v. Nagamuthu*, 4 Mad. 200.

(*t*) *Sookhmoy Chunder v. Srimati*, 12 I. A. 103; *Lloyd v. Webb*, 24 Cal. 44.

(*u*) *Prafulla Chunder v. Jogendra Nath*, 9 C. W. N. 528.

(*v*) *In re Macleay* L. R. 20 Eq. 186; *Doed. Gill v. Pearson*, 6 East. 173.

(*w*) 59 I. A. 286.

it was held that a direction restraining the transferee from transferring the property outside the family was valid. That was a case under the Transfer of Property Act. (See Mulla's Transfer of Property Act, 2nd Edn., p. 87).

Successive interests.—In *Nisar Ali Khan v. Mahomed Ali Khan*(x), a testator by his will declared that he was the owner (Malik) of the property, that after his death his nephew should have like him the same powers of possession and enjoyment as owner (Malikana) if he were alive, that after the nephew the testator's son if alive should succeed with the same powers, that after the son another nephew should succeed and after him the descendants of these legatees. On the death of the testator the first nephew entered into possession. The son filed the suit for construction. It was held that the dominant intention of the testator was to confer successive life interests and the plaintiff was entitled to succeed. Their Lordships of the Privy Council did not decide as to the effect of the will after the death of the plaintiff as the third tenant for life was dead. This case was followed in *Khajeh Habibullah v. Ananga Mohan*(y). Where the Court can collect from the language of the will that the dominant intention of the testator was to bequeath a certain property in succession to more than one person, the first in series of such person takes only a life interest in the property and the words indicating that absolute interest was given to such person should be rejected as repugnant to the dominant intention.

Postponement of Possession beyond Majority.—Where a will confers an absolute gift but directs that the property shall not be made over to the legatee until he attains a certain age, e.g., 25 or 30, beyond majority, such a direction is inoperative, unless the will confers an interest in the property upon some person for the intervening period and the legatee is entitled to have the property handed over to him as soon as he attains majority(z).

Property and Power.—A gift to be at the disposal of A is an absolute gift(a). So also, if there is a gift to A in general terms, a superadded power to dispose of the property in question by will, or at the donee's death, does not cut down the absolute gift(b). And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given(c). But if the gift is to A for life, with a superadded power to dispose of the whole for his own benefit, A takes only a life interest if he does not exercise the power(d).

Distinction between a repugnant clause and a Defeasance clause.—The distinction between a defeasance clause and a repugnant one is a nice one. One useful test that has been formulated in *Govindaraja v. Mangalam Pillai*(e), is to ascertain whether the intention of the testator is to maintain the absolute estate conferred on the donee with restriction in derogation of the incidents of such absolute ownership or whether the intention of the testator is to extinguish the absolute estate on the happening of a contingency. In the first case it is a repugnant clause, but in the second case where the intention is to extinguish the absolute estate, on the happening of a contingency and where the effect of the termination of the said estate would not be the violation of any rule of law, the clause is a defeasance clause(f).

(x) 59 I. A. 268.

(y) (1942) 2 Cal. 363.

(z) *Gosling v. Gosling*, John 265 followed in *Hussenbhoj v. Ahmedbhoj* 26 Bom. 319; *Gosavi Shivgar v. Rivett Carnac*, 13 Bom. 463; *Lloyd v. Webb*, 24 Cal. 44.

(a) *Kellett v. Kellett*, 3 H. L. 160.

(b) *Southouse v. Bate*, 16 Beav. 132.

(c) *Howorth v. Dewell*, 29 Beav. 18.

(d) See *Archibald v. Wright*, 9 Sim. 161 and other cases cited at p. 482, Theobald on Wills, 7th Edn.

(e) A. I. R. (1933) M. 80; 63 M. L. J. 911 at p. 913.

(f) *Golak Behari v. Sura Dhani*, (1939) 1 Cal. 63.

139. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Direction that mode enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee.

Illustrations.

(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

[This is sec. 126 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section embodies the rule in *Lassence v. Tierney*(g), quoted in section 138. It is a corollary to sec. 138; in order to entitle the legatee to the bequest it must be absolute and severed from the general estate. The rule applies as well to testamentary gifts as to gifts *inter vivos*(h). It is settled law that if you find an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute interest which fail either from lapse or invalidity or any other reason then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be(i). In *Soundarajan v. Natarajan*(j) this section was held not to apply because on a true construction of the will there was no intention to confer an absolute estate on the daughters but the interest of each daughter was confined to an income for life and there was an intestacy after the termination of the life interest of the daughter.

140. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Bequest of fund for certain purposes, some of which cannot be fulfilled.

Illustrations.

(i) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(ii) A bequeaths the residue of his estate, to be divided equally among his daughters with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

[This is sec. 127 of the Succession Act X of 1865. It applies to Hindus, etc.]

(g) 1 Mac. & G. 551.

(h) *Attorney General v. Lloyds Bank*, (1935) A. C. 382.

(i) *Greenwood v. Greenwood*, A. I. R. (1939)

(P.C.) 78.; *Hancock v. Watson*, (1902) A. C. 22.

(j) 52 I. A. 180; 48 Mad. 906 (P. C.) (overruling 44 Mad. 446)=49 M. L. J. 836.

This section is a counter-part to section 139. Under section 139 the bequest is *absolute* and is *severed*. Under this section the bequest is *not absolute* and is *not severed* from the general estate. Under section 139 the fund belongs to the legatee; under this section the fund remains a part of the testator's estate.

This section applies where the original gift is not absolute but only a life interest is given (as in the illustrations) and the bequest is for certain purposes; in such a case the interest which is not exhausted upon the objects contemplated by the will, will remain as part of the estate of the testator. The question in all such cases is a question of construction whether the gift is beneficial or in trust.

Precatory Trusts.—On the question whether a gift is beneficial or in trust, the English cases are numerous, (see Halsbury, Vol. 33, pp. 96-97). But the tendency of the modern decisions is not to construe doubtful words into a declaration of trust merely because the testator expresses a “wish”, “desire”, “confidence”, “recommendation”, “request”, or “direction”. Trusts created by such words are usually called “precatory trusts”. In the case of *Lamb v. Eames(k)*, Lord Justice James said, “In hearing case after case cited I cannot help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness,” and in *Re Adams and Kensington Vestry(l)*, Lord Justice Cotton expressed, “I have no hesitation in saying myself that I think some of the older authorities went a great deal too far in holding that some particular words in a will were sufficient to create a trust”.

A gift to a person for some particular purpose, whether declared or not, creates a trust(m). But in order that the Court may imply a trust the property to be subject to and the objects to be benefited must be sufficiently certain, and the words must be such that the Court finds them to be imperative on the first taker of the property. “The rules are clear with respect to the doctrine of precatory trusts that the words of gift must be such that the Court finds them *imperative* on the first taker of the property and must sufficiently indicate both the subject matter and the objects to be benefited. If there is uncertainty as to the *amount* or *nature of the property* that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt on the intention of the testator and seems to show that he could not possibly have intended his words of confidence, hope, etc.—his appeal to the conscience of the first taker—to be imperative words”(n).

Therefore, mere expressions of a desire that the donee will be kind to, remember, or do justice to, a certain class of persons will raise no trust. Also, if the donee has a wide discretion as to the objects to be benefited, *e.g.*, where there is absolute power of disposal or words of indefinite gift followed by a “desire”, or “recommendation”, or “confidence” that the donee will, at his decease, dispose of the property amongst a particular class of persons, that will not create a trust. No trust will be implied from precatory words:—

- (a) Where the donee may, at his discretion, apply the property to other purposes.
- (b) Or, where there is an express direction that the donee's absolute interest is not to be curtailed.

(k) L. R. 6 Ch. App. 597.

(l) 24 C. D. 199; 27 Ch. D. 394 (see also *Re Atkinson*, (1911) 103 L. T. 860.)

(m) *Corporation of Gloucester v. Osborn*, 1 H. L. 272.

(n) *Mussoorie Bank v. Raynor*, 4 All. 500 (P. C.); 9 I. A. 70; *Comiskey v. Bowring-Hanbury*, (1905) A. C. 84; *Adm.-General v. Lazar*, 4 Mad. 244; *Natha v. Dhunbaji*, 23 Bom. 1.

- (c) Or, where the precatory words are stated to be not obligatory.
 (d) Or, where the donee is to take free and unfettered. (Theobald on Wills, 7th Edn., p. 491).

If there is a gift *subject* to trusts, the donee takes whatever is not required for the performance of those trusts(o). But if the gift is *upon trust*, the donee holds the property for the purposes declared and if they fail the property goes to the residuary legatee or the next-of-kin or the donor if the donor dies testate or intestate as the case may be.

Examples.

(1) A Hindu by his will, after appointing executors, gave the following directions.—“You should give my brothers, their wives, and children according to your wishes.” *Held*, that no trust was created by these words(p).

(2) A testator gave all his property to his wife “absolutely with full power to her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so.” *Held*, wife took absolutely(q).

(3) A testator gave his property to his son G that the same be “dealt with according as he may think proper and when the sons of my son shall attain 21 the same shall be divided between G and his sons in equal shares. *Held*, G took absolutely and there was no trust in favour of his sons(r).

(4) A bequest is made to A with request that he should distribute it amongst such members of the family of B as he should think most deserving. *Held*, no trust was created, as the objects of the trust were not clearly indicated(s).

(5) A testator bequeaths his land to his brother “from generation to generation and for ever” with power to alienate by sale, etc., but directs that his brother should enjoy the land jointly with the testator’s wife. *Held*, brother not entitled to alienate during the widow’s lifetime and that the direction contained in the latter part was not invalid(t).

(6) A testatrix gave “all my property who at the time of my death shall be the abbess of the Franciscan convent absolutely” and appointed her executrix. The will was attested by B and C, nuns of the same convent. After the date of the will B became the abbess. *Held*, B did not take the legacy absolutely but in trust for the fund of the convent and the gift was not invalid because of B’s attestation(u).

CHAPTER XIII.

Of Bequests to an Executor.

Legatee named as executor cannot take unless he shows intention to act as executor.

141. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

[This is sec. 128 of the Succession Act X of 1865. It applies to Hindus, etc.]

Where a legacy is given to a person in the character of an executor and not as a mark of personal regard only the bequest is conditional on his accepting the office and the legatee is not entitled to the legacy unless he proves the will, or other-

(o) *Dawson v. Clarke*, 18 Ves. 247.

(p) *Kumarasami v. Subraya*, 9 Mad. 325.

(q) *In re Hutchinson and Tennant*, (1878) 8 Ch. D. 540.

(r) *Anand Rao v. Adm.-General*, 20 Bom. 450;

Purmanundas v. Venayek Rao, 9 I. A. 86.

(s) *Green v. Marsden*, 1 Drew. 646; *Johnston v. Rowlands*, 2 De G. & Sm. 356.

(t) *Periya v. Narayana*, 28 Mad. 256.

(u) *In re Ray's Will Trusts*, (1936) 1 Ch. 520

wise manifests his intention to act as executor. It is a conditional bequest, the condition being a condition precedent and unless the condition is fulfilled the legacy does not vest. The legacy is *prima facie* given to him for his trouble and if the legatee refuses the office of executor he is not entitled to it. The rule applies although the legacy be not given to the person as executor but by name and description. This section applies when the executor survives the testator. If a bequest is made to a child of the testator and the child is also appointed executor and such child predeceases the testator leaving a lineal descendant such lineal descendant is entitled under sec. 109 to the legacy notwithstanding the fact that his father is not able to act as executor(v). Generally speaking if a legacy is given to an infant as executor, he is entitled to the legacy if on attaining majority he accepts the office(w).

The English law is different. See Halsbury Vol. 14, p. 349. There it is a question of presumption. In England if a legacy is given to a person who is named as an executor the presumption is that the legacy is given to him in that character, and if he wishes to repel that presumption the onus will be on him to do so(x). Under sec. 141 it is even doubtful whether the Court would admit parol evidence to rebut the presumption that the legacy was given to him in the character of an executor but as a mark of personal regard only, i.e., whether the legatee accepts the office or not he is entitled to the legacy beneficially, see *Prosono Koomar v. Administrator-General(y)*, where the Court refused to admit parol evidence. According to the English cases if a legacy is given to an executor who is named as one after the death of a tenant for life(z), or where there is a motive expressed, as a gift to "my friend and executor"(a), or where the gift is of residue(b), that is sufficient to rebut the presumption.

When the legacy is attached to the office, an executor who does not act is not entitled to the benefit, even though he be prevented from acting by age or infirmity(c). Where a legacy is bequeathed to the executor along with other beneficiaries who are minors the executor must proceed with exceptional care in making the allocation to himself(d).

"Proving the Will or Manifesting an Intention to act."

It is not absolutely necessary to prove the will. It is sufficient if the executor has done something showing an intention to act as executor. But the mere fact of proving the will would not be sufficient if the legatee had not the *bona fide* intention of administering the estate, but he merely procured the probate to enable him to violate in the grossest manner the confidence reposed in him by the testator (e). There is no time-limit for proving the will. The executor may prove the will at any time before the estate is fully administered. If the executor is abroad and sends a power of attorney under which another person administered the estate and the executor died without proving the will, it was held that he had sufficiently manifested his intention to act and was entitled to the legacy(f). The expression "manifest an intention" was considered in *Rajam v. Pankajam(g)* where the executor went to the house of the deceased to take an inventory but the widow of the deceased objected and he went away. After three or four days he decided to renounce the executorship, to avoid unpleasantness to family, and it was held that he had not manifested an intention to act as executor.

(v) *Ramaswamy v. Kuppuswami*, 13 M. L. J. 351.

(w) *Re Gardner*, 67 L. T. 552.

(x) *In re Howell, Liggins v. Buckingham*, (1914) 2 Ch. 173.

(y) 15 Cal. 88.

(z) *Re Reeve's Trusts*, (1873) 4 Ch. D. 841.

(a) *Re Denby*, 3 De. G. & J. 350; see

Contra, Reed v. Devaynes, 3 Bro. C. C. 95.

(b) *Christian v. Devereux*, 12 Sim. 264.

(c) *Hanbury v. Spooner*, 5 Beav. 630.

(d) *Mary Elizabeth v. Gerald*, A. I. R. (1939) P. C. 33.

(e) *Harford v. Browning*, 1 Cox. 302.

(f) *Lewis v. Mathews*, 8 Eq. 277.

(g) A. I. R. (1944) M. 337.

If the legatee gives directions about the funeral of the testator and is prevented by death from further entering upon his office, that is sufficient(*h*).

If the executor is abroad and sends a power of attorney, that is sufficient(*i*).

Annuity to Executor and Legal Adviser for his trouble.

Where an annuity is given to an executor for his trouble it ceases when the duties cease(*j*); but it does not cease by reason of the institution of administration proceedings(*k*). In *Sarat Chandra v. Sada Siva Mitter*(*l*) a testator stated "my present legal adviser M. should remain as legal adviser after my death for the protection of my interest of and for the benefit of the estate and so long as he will remain engaged on business he shall get retainers and fees as fixed at present." It was held that the executors were not compellable to employ the pleader for an indefinite period and there was no trust for the benefit of the pleader. When a legal adviser is appointed one of the executors, he will not be entitled to charge personal costs unless the will expressly provides for the payment of such costs.

Lien—When an executor, who is also a beneficiary, is in default to his testator's estate, the estate is entitled to a lien upon his beneficial interest, (Halsbury, Vol. 14, p. 217).

CHAPTER XIV.

Of Specific Legacies

142. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific :

Illustrations.

- (i) A bequeaths to B—

"the diamond ring presented to me by C":
 "my gold chain":
 "a certain bale of wool":
 "a certain piece of cloth":
 "all my household goods which shall be in or about my dwelling-house in M. Street, in Calcutta, at the time of my death":
 "The sum of 1,000 rupees in a certain chest":
 "the debt which B owes me":
 "all my bills, bonds and securities belonging to me lying in my lodgings in Calcutta":
 "all my furniture in my house in Calcutta":
 "all my goods on board a certain ship now lying in the river Hughli":
 "2,000 rupees which I have in the hands of C":
 "The money due to me on the bond of D":
 "My mortgage on the Rampur factory":
 "one-half of the money owing to me on my mortgage of Rampur factory":
 "1,000 rupees, being part of a debt due to me from C":
 "my capital stock of 1,000*l.* in East India Stock":
 "my promissory notes of the Central Government for 10,000 rupees in their 4 per cent loan":
 "all such sums of money as my executors may, after my death, receive in respect of the debt due to me from the insolvent firm of D and Company":
 "all the wine which I may have in my cellar at the time of my death":
 "such of my horses as B may select":
 "all my shares in the Imperial Bank of India":

(h) *Harrison v. Rowley*, 4 Ves. 216; *Prosonno Kumar v. Adm.-General*, 15 Cal. 83.
 (i) *Lewis v. Mathews*, L. R. 8 Eq. 277.

(j) *Hall v. Christian*, 17 Eq. 546.
 (k) *Baker Martin*, (1836) 8 Sim. 25.
 (l) 43 C. W. N. 172.

“all my shares in the Imperial Bank of India which I may possess at the time of my death” :

“all the money which I have in the 5½ per cent loan of the Central Government” :

“all the Government securities I shall be entitled to at the time of my decease” :

Each of these legacies is specific.

(ii) A, having Government promissory notes for 10,000 rupees, bequeaths to his executors “Government promissory notes for 10,000 rupees in trust to sell” for the benefit of B. The legacy is specific.

(iii) A, having property at Benares and also in other places, bequeaths to B all his property at Benares. The legacy is specific.

(iv) A bequeaths to B—

his house in Calcutta :

his zamindari of Rampur :

his taluq of Ramnagar :

his lease of the indigo-factory of Salkya :

an annuity of 500 rupees out of the rents of his zamindari of W.

A directs his zamindari of X to be sold, and the proceeds to be invested for the benefit of B.

Each of these bequests is specific.

(v) A by his will charges his zamindari of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamindari to D. Each of these bequests is specific.

(vi) A bequeaths a sum of money—

to buy a house in Calcutta for B :

to buy an estate in zila Faridpur for B :

to buy a diamond ring for B :

to buy a horse for B :

to be invested in shares in the Imperial Bank of India for B :

to be invested in Government securities for B :

A bequeaths to B—

“a diamond ring” :

“a horse” :

“10,000 rupees worth of Government securities” :

“an annuity of 500 rupees” :

“2,000 rupees to be paid in cash” :

“so much money as will produce 5,000 rupees four per cent. Government securities” :

These bequests are not specific.

(vii) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C and directs that it shall be paid out of property which he may leave in England. No one of these legacies is specific.

[This is sec. 129 of the *Succession Act X of 1865*. It applies to *Hindus, etc.*] The words “*Central Government*” in ill (i) have been substituted for the words “*Government of India*” by *Government of India (Adaptation of Indian Laws) Order 1937*].

The word “legacy” is not defined in this section. In England the word “legacy” or “bequest” denotes a gift of personal estate and the word “devise” denotes a gift of real estate. There is no such distinction under this Act and the word “legacy” is used for denoting a gift of moveable or immoveable property, (See ill. iv).

Legacies are ordinarily divided into two classes namely specific legacies and general legacies. There is also a third kind of legacy called demonstrative legacy. It is not always easy to determine to which of these classes a given legacy belongs, but the distinction is important. A specific legacy is defined by this section as being a specified part of the testator’s property and it must be a part as distinguished from the whole of his property. It must be identified by a sufficient description and separated in favour of the particular legatee from the general mass of the testator’s property. The definition given in this section corresponds with the

definition in the judgment of Jessel, M. R., in *Bothamley v. Sherson(m)*. In order to determine whether a legacy is specific or not the following tests may be applied

- (a) It must be a part of the testator's property.
- (b) It must be a part specifically as distinguished from the whole, *i.e.*, a severed or distinguished part.
- (c) It must not be of the whole of the testator's property or of the general residue.
- (d) It should be taken in the condition in which it is. The use of the word "my" before the thing bequeathed has always been considered to be a factor almost conclusive in determining that the legacy is specific.

A general legacy may or may not be a part of the testator's property. It is a gift of something which in the event of the testator leaving sufficient assets must be raised by his executor out of his general estate. There is no definition of general legacy in this Act.

A demonstrative legacy is defined under sec. 150. It consists of a pecuniary legacy payable out of a particular fund. The distinction between a specific legacy and a demonstrative legacy is given in the Explanation to sec. 150.

Distinction between General and Specific legacies.—(1) In case of General legacies general legacies if the assets of the testator after payment of abate on deficiency debts, necessary expenses, and specific legacies are not sufficient of assets. to pay all the general legacies in full, they abate proportionately, (sec. 327). A specific legacy, so long as the specified thing is in the testator's possession, is not liable to abatement with the general legacies on a deficiency of assets, (sec. 149). On the other hand, if the thing specifically bequeathed does not at the time of his death belong to the testator or is converted into property of another kind, in other words if the legacy is *adeemed*, the specific legatee will not be entitled to any recompense or satisfaction out of the general estate.

(2) Again, in case of a specific bequest to two or more persons in succession the property specifically bequeathed should be retained in the same form, though it be of a wasting nature and notwithstanding that there is a danger that one object of the testator's bounty will be defeated by the tenancy for life lasting as long as the property enures, (sec. 147). But if the property is not specifically bequeathed but is a general bequest to two or more persons in succession, and if the property is of a wasting nature then the rule is that it is to be converted into permanent property, in other words, it must be invested in authorized securities, (sec. 148).

(3) A specific legacy carries income or interest from the testator's death, (sec. 349). A general legacy carries interest from the expiration of one year after the testator's death, (sec. 351).

(4) A specific legatee takes the bequest subject to all incumbrances existing at the death of the testator and clear the incumbrance, (sec. 167).

Examples of Specific Legacies.

Money stocks and Shares.—*Prima facie* a money legacy or legacies of stocks and shares are general legacies, or pecuniary legacies (sec. 145). But a bequest of "Rs. 1,000 in a certain chest" or "Rs. 2,000 which I have in the hands of C" or "the money due to me on the bond of D" are specific legacies, (see *ill. i*). A money legacy is not specific even though the security in which the money is invested is described in the will, (sec. 143).

The word "my" will indicate a specified part of the testator's property particularly in respect of stocks and shares, *e.g.*, "all my bills, bonds and securities belonging to me lying in my lodgings in Calcutta," "my capital stock of £1,000 in East India Stock," "my promissory notes of the Government of India for 10,000 rupees in their 4 per cent Loan," "all my shares in the Imperial Bank of India" (see *ill. i*).

But a bequest in general terms of a certain amount of any kind of stock is not a specific bequest, although the testator was possessed of the specified kind of stock of an equal amount, (sec. 144). In *In re Gage, Crozier v. Gutheridge*(n), a testator bequeathed to his niece £1,150 five per cent War Loan in the following words, "I give and bequeath unto my niece E, the sum of £1,150 five per cent War Loan of 1929-47". At the date of the will the testator held £1,150 War Loan of that denomination; but the loan was in accordance with the Government notice ordered to be redeemed and was repaid in cash. There were no War Loans of the denomination in the possession of the testator at his death. It was contended that the bequest was specific and adeemed. It was held that the bequest was a general bequest and not adeemed and the legatee was entitled to call upon the executor to purchase for her three and a half per cent War Loan of £1,150. The absence of possessive pronoun "my", was an indication that the bequest was not specific, (see judgment at p. 539).

Debt.—A bequest of debt due to the testator may be specific, *e.g.*, "the debt which B owes me," "the money due to me on the bond of D," "my mortgage on the Rampur Factory." But if the legacy is given out of a debt due to the testator from a third person it will be demonstrative (*ill. i*, sec. 150).

Land.—Every devise of land, is specific(o), (*ill. iii*). A bequest of leasehold property is specific(p) (see also *ill. i* to sec. 147). Also a devise of land to be sold and divided among certain persons makes them specific legatees, (*ill. iv*, last illustration). A bequest of an annuity out of the rents of immoveable property is specific, (*ill. iv*). But if the apparent intention of the testator is to give an annuity at all events but directs that it should be paid out of the rents of a property the legacy is demonstrative, (*ill. ii*, sec. 150). If the immoveable property is charged with an annuity the bequest will be specific, (*ill. v*). A mere gift, however, of a legacy to be paid out of or charged on immoveable property will not be specific, (*ill. iii*, sec. 150). A bequest of rent-producing property to the trustees on trust to apply the rents and profits for the benefit of a legatee is not a specific bequest as the rents and profits are liable to fluctuate(q). In *Bhagirathibai v. Advocate-General*(r), a testator stated in his will that the monthly rent of his property was Rs. 1,000 and directed that out of the rent Rs. 125 be paid to each, his wife and three daughters, per month and Rs. 500 per month to his wife for family expenses. It was held that the bequests were specific.

Bequest of certain sum where stocks, etc., in which invested are described.

143. Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will.

Illustration

A bequeaths to B—

"10,000 rupees of my funded property":

(*) (1934) 1 Ch. 536.

(o) *Forrester v. Leigh*, Amb. 171; *Hensman v. Fryer*, (1868) L. R. 3 Ch. 420.

(p) *Long v. Short*, 1 P. W. 403.

(q) *Bai Bhikaiji v. Bai Dinbat*, 13 Bom. L. R. 319.

(r) 39 Bom. L. R. 497.

“ 10,000 rupees of my property now invested in shares of the East Indian Railway Company ” :

“ 10,000 rupees, at present secured by mortgage of Rampur factory ” :

No one of these legacies is specific.

[This is sec. 130 of the Succession Act X of 1865. It applies to Hindus, etc.]

A money legacy is *prima facie* a general legacy and the mere description of the securities in which the money is invested is indicated will not make it a specific legacy. A legacy of a certain number of shares of a particular description is not specific(s). But if the gift of a sum of stock is coupled with a direction that if the stock is not in existence, the executors should out of the residue of the estate purchase enough to make up the deficiency, it will make the legacy specific(t). The word “my” preceding the word stock or fund is sufficient to render the legacy specific, (ill. i., sec. 142).

144. Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

Illustration

A bequeaths to B 5,000 rupees five per cent Government securities. A had at the date of the will five per cent Government securities for 5,000 rupees. The legacy is not specific.

[This is sec. 131 of the Succession Act X of 1865. It applies to Hindus, etc.]

The mere circumstance that the testator has at the date of his will stocks or securities of the specified kind of equal amount or of greater amount than the amount bequeathed is not a ground upon which the Court can conclude that the legacy is specific, unless there is a clear description in the will to show that the testator meant to give to the legatee the particular shares of which he was possessed at the date of his will, e.g., “all my shares in the Bank of Bengal” as in illustration(i) to sec. 142. If the intention is to give the *identical* stock of which the testator was possessed at the date of the will, the legacy is specific.

145. A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.

Bequest of money where not payable until part of testator's property disposed of in certain way.

Illustration

A bequeaths to B 10,000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England. The legacy is not specific.

[This is sec. 132 of the Succession Act X of 1865. It applies to Hindus, etc.]

A testator directed that his land should be sold and out of the sale proceeds certain money legacies should be paid to his widow and two daughters. It was held that the legacies were not specific(u).

Also a legacy of money to procure a specified object for the legatee, as a sum to buy a house or to buy a ring is a general legacy, (ill. vi., sec. 142). Again, where

(s) *Re Gray*, 36 Ch. D. 205.

(t) *Townsend v Martin*, 7 Hare 471.

(u) *Rajanikant v. Kiko*, 34 Bom. L. R. 1124.

sums of money are bequeathed by a testator who has property in England and India to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific (ill. *vi.*, sec. 142).

The test to try whether a bequest is or is not specific is to inquire what would be the result if there had been pecuniary legacies with a deficient fund or a necessity for a sale for payment of debts, *i.e.*, to inquire whether or not in such a case the bequest would have been protected in competition with the clauses of pecuniary legatees(v).

146. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

When enumerated articles not deemed specifically bequeathed.

[*This is sec. 133 of the Succession Act X of 1865. It applies to Hindus, etc.*]

A general residuary clause merely because it enumerates some properties specifically will not be construed as constituting specific legacies of the articles enumerated (w). But if the specific articles enumerated in the residuary gift are distinguished by such words as "as well as" "together with" or "and also" the gift will be specific(x).

147. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Retention, in form, of specific bequest to several persons in succession.

Illustrations

(i) A, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is to enjoy the property as A left it, although, if B lives for fifteen years, C can take nothing under the bequest.

(ii) A, having an annuity during the life of B, bequeaths it to C, for his life, and, after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.

[*This is sec. 134 of the Succession Act X of 1865. It applies to Hindus, etc.*]

In the case of general legacies or in the case of the bequest of residue of the testator's property if the bequest is to two or more persons in succession, then the intention of the testator is that his legatees should enjoy the thing bequeathed in succession. In order to give effect to the intention the rule is that such parts of the estate as are of a wasting or perishable character or are represented by securities of a hazardous nature should be converted and invested in approved securities, (see sec. 148). This section is an exception to this rule. If the intention of the testator is that the property should be enjoyed *in specie*, that intention must be given effect to, although the property may be of a wasting nature.

(v) *Norman v. Norman*, (1919) 1 Ch. 297.

(w) *Taylor v. Taylor*, 6 Sim. 248; *Fielding v. Preston*, 1 De G. & J. 438.

(x) *Fitzwilliam v. Kelly*, 10 Hare, 274; *Mills v. Brown*, 21 Beav. 1.

148. Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

Illustration

A, having a lease for a term of years, bequeaths all his property to B for life, and, after B's death, to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

[This is sec. 135 of the Succession Act X of 1865. It applies to Hindus, etc.]

The rule laid down in this section is known as the rule in *Howe v. Dartmouth* (Earl)(y). In England this rule has undergone a considerable change. The rule was applied in *In re Trollope's Will Trusts*(z). But in *In re Fawcett, Public Trustee v. Dugdale*(a), Farwell, J., makes the following observation :—"The rule in *Howe v. Dartmouth* was based upon the equitable idea of treating that which ought to be done as having been done, and accordingly the general rule was that the tenant for life was entitled to whatever the investments, if they were sold and reinvested in consols, would produce. To that extent, and to that extent only, he was entitled to payment on account of income. In more recent years the practice has generally been to give to the tenant for life interest at 4 per cent upon the capital value of the unauthorized investments. The reason for the alteration of the rule was, I think, due to the fact that the range of authorized investments has been very greatly extended in comparatively recent years, and accordingly the Court took the view that a rate of interest which might be higher than that which was produced by consols would be reasonable rate to allow to tenant for life, since there was, at any rate, some possibility that trust funds would be invested in securities returning such income. The general, although not the universal, rule is now to allow 4 per cent. In order to give effect to that rule it appears to me that in a case of this kind it is the duty of the trustees to have the unauthorized investments valued as at the end of the first year after the testatrix's death. During that year the executors are given time to deal with the estate as a whole. At the end of it comes the time when in my judgment, any unauthorized investments which they still retain should be valued and the tenant for life becomes entitled to be paid 4 per cent on the valuation of the whole of the unauthorized investments. To that extent these tenants for life are entitled to receive income in each year and that income, 4 per cent on the capital value of the unauthorized investments, must be paid out of the actual income received from the unauthorized investments, that is to say, the trustees will receive the whole of the dividends which the unauthorized investments pay and there will be no apportionment. Those dividends will be applied in the first instance in paying, so far as they go, 4 per cent on the capital value of the unauthorized investments. If the income received on the unauthorized investment is more than sufficient to pay 4 per cent, then the balance will be added to the capital and it will form part of the whole fund in the hands of the trustees. If, on the other hand, the income actually received from the unauthorized securities is not sufficient to pay 4 per cent

(y) 7 Ves. 137.

(z) (1927) W. N. 77.

(a) (1940) 1 ch. 402; see also *In re Wood-*

house, Public Trustee v. Woodhouse, (1941) 1 ch. 332.

in each year to the tenants for life, they will be entitled to immediate recoupment out of the capital, but when the unauthorized investments are sold the trustees will then have in their hands a fund representing the proceeds of sale of the unauthorized investments together with any surplus income which may have accrued in the earlier years; out of those proceeds of sale the tenants for life will be entitled to be recouped so as to provide them with the full 4 per cent, during the whole period and they will be entitled to be refunded the deficit calculated at 4 per cent simple interest but less tax. In that way it appears to me the rule can be worked out satisfactorily as between capital and income and the balance will be held as evenly as possible between those two opposing interests. *No doubt it is the duty of the trustees to realize the unauthorized securities as soon as conveniently may be, but until that has been done that, in my view, is the right way of dealing with the matter.*"

In this case there was no power to postpone the sale and the judgment does not necessarily apply in a case where there is an express power to postpone; other considerations may arise in such a case, but where there is no power to postpone and there is a trust for sale and reinvestment in trustee securities the judgment indicates the right way in which the administration of the estate should be proceeded with. (See p. 407 of the Report).

If the instrument empowers the executors to postpone the sale at their discretion, then in order to exclude the operation of the rule, the executors must actually exercise their powers of postponement and when they have done so any resulting income is to be regarded as capital and the life tenant will have no claim to an apportionment being made(b). Under this section all properties are directed to be converted whether they are or are not of a wasting nature. If the property is not specifically bequeathed and if the bequest is to two or more persons in succession, then it is the duty of the executor to sell it and the sale proceeds should be invested in the authorized securities. This rule must be applied, unless there is a direction in the will to the contrary. This rule does not apply in the case of immoveable property situate in a foreign country(c).

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

149. If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

[This is sec. 136 of the Succession Act X of 1865. It applies to Hindus, etc.]

The advantage of a specific bequest is that it is not subject to abatement like general legacies if the assets are not sufficient. If the assets are insufficient to pay all the general legacies in full, then they abate *pro rata* (sec. 327) and the executor has no right to prefer one legatee over another. Specific legacies are not subject to abatement with general legacies. If the thing specifically bequeathed exists at the date of the death of the testator and if other assets of the testator are sufficient to pay all his debts, then the thing specifically bequeathed must be given to the legatee by the executor, (sec. 328). But when the assets are insufficient to pay all the debts of the testator, then the specific legacies will abate rateably *inter se*, (Halsbury, Vol. 14, p. 277). In *Bhagirathibai v. Advocate-General*(d), a specific bequest was made of certain amount out of the rent of an immoveable property to the testator's wife and three daughters. The rent having fallen down it was held that the payment should abate in proportion to the rent.

The disadvantage of a specific bequest is that if the thing specifically bequeathed does not exist at the death of the testator, the legacy is adcmmed, *i.e.*, it fails

(b) *Re Hey's Settlement and Will Trusts*, (1945) All. E. R. 618.

235.

(c) *Re Moss, Moss v. Valentine*, (1908) 2 Ch.

(d) 39 Bom. L. R. 497.

entirely (sec. 152), and the legatee has no claim whatsoever over the other assets of the testator.

CHAPTER XV

Of Demonstrative Legacies.

150. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Demonstrative legacy defined.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific ;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations

(i) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific, the legacy to C is demonstrative.

(ii) A bequeaths to B—

“ten bushels of the corn which shall grow in my field of Green Acre” ;

“80 chests of the indigo which shall be made at my factory of Rampur” ;

“10,000 rupees out of my five per cent promissory notes of the Central Government” ;

an annuity of 500 rupees “from my funded property” ;

“1,000 rupees out of the sum of 2,000 rupees due to me by C” ;

an annuity, and directs it to be paid “out of the rents arising from my taluk of Ramnagar”.

(iii) A bequeaths to B—

“10,000 rupees out of my estate at Ramnagar,” or charges it on his estate at Ramnagar :

“10,000 rupees, being my share of the capital embarked in a certain business.”

Each of these bequests is demonstrative.

[This is sec. 137 of the Succession Act X of 1865. It applies to Hindus, etc. The words “Central Government” in illustration (i) are substituted for the words “Government of India” by Government of India Adaptation of Indian Laws Order, 1937.]

The definition of a Demonstrative Legacy is given in this section. It consists of a pecuniary legacy, i.e., “a certain sum of money or a certain quantity of any other commodity,” payable out of a particular fund or stock which fund or stock is the *primary* source out of which the payment is to be made. Such a legacy has the following advantages :—

(a) It is not adeemed by the total or partial failure at the testator's death of the fund out of which it was directed to be paid, but becomes payable out of the general assets of the testator, (secs. 151 and 153). But this rule does not apply where there are directions to the contrary in the will(e).

(b) It does not abate with the general legacies until after the particular fund is exhausted. It only abates when it becomes a general legacy by reason of the failure of the fund(f).

(e) *Chinnam v. Tadikonda*, 29 Mad. 155.

(f) *Bhagirthibai v. The Adv.-General*, 39 Bom.

L. R. 497; A. I. R. (1937) B 384.

Explanation.—The distinction between a specific legacy and a demonstrative legacy is given in the explanation. A demonstrative legacy is in its nature a general legacy. The only distinction between a general legacy and a demonstrative legacy is that where a specific property is indicated out of which the legacy is payable it becomes a demonstrative legacy. An illustration of demonstrative legacy is in *Rajam Kant v. Keki(g)* where the testator directed that his land be sold and out of the sale proceeds Rs. 10,000/ be paid to his wife and Rs. 4,000 to his daughter. It was held that the legacies were demonstrative.

151. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

[This is sec. 138 of the Succession Act X of 1865. It applies to Hindus, etc.]

Order of Payment.—When there is a *specific bequest* of a portion of a fund and also a legacy directed to be *paid out* of that fund (demonstrative), then the order for payment is as follows :—

- (1) The specific bequest must be paid first.
- (2) Out of the residue the demonstrative legacy should be paid.
- (3) If the residue is not sufficient to pay the demonstrative legacy in full, the rest of the demonstrative legacy must be made good out of the general assets of the testator.

CHAPTER XVI

Of Ademption of Legacies.

152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations

- (i) A bequeaths to B—
 “the diamond ring presented to me by C”;
 “my gold chain”;
 “a certain bale of wool”;
 “a certain piece of cloth”;
 “all my household goods which shall be in or about my dwelling house in M. Street in Calcutta, at the time of my death.”

A in his lifetime,—
 sells or gives away the ring :

(g) 34 Bom. L. R. 1124; (see also *Sahib Mirza v. Umda Khanum*, 19 Cal. 444.

converts the chain into a cup :
 converts the wool into cloth :
 makes the cloth into a garment :
 takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(ii) A bequeaths to B—

“ the sum of 1,000 rupees in a certain chest ” :
 “ all the horses in my stable.”

At the death of A, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(iii) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed.

[This is sec. 139 of the Succession Act X of 1865. It applies to Hindus, etc.]

Definition:—Ademption may be defined to be the failure of a specific bequest or devise through its subject not being in existence *in specie* at the time of the testator's death as a part of his estate(h).• It is only the specific legacy that is liable to ademption. A demonstrative legacy is not subject to ademption (sec. 158). As explained in this section a specific gift may be adeemed by the subject-matter of the gift afterwards, during the testator's life, ceasing to be part of his estate or ceasing to conform to the description by which it is given on account of the testator's disposition or conversion or change of investment of the subject of the bequest, the conversion must be complete in the lifetime of the testator(i). This section lays down the general rule regarding ademption of specific legacies. Sections 154 to 166 lay down special rules for the guidance of the Courts on the subject of ademption. As a general rule in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie*. A specific devise of land is adeemed if the land is afterwards sold, though the purchase money may be impressed with a trust for re-investment in land(j). A contract for sale entered into after the date of the will, though not completed in the testator's life is sufficient to cause ademption(k). In such a case the specific legatee is entitled to enjoy the property and to take the rents until the time for the completion of sale or if no time is fixed until the time when the same ought reasonably to be completed(l).

But where the disposition of the subject of specific bequest is not absolute, e.g., where the testator pawns an article specifically bequeathed, a right of redemption is left in him and passes to the legatee. (See sec. 167 Ill. i).

Examples.

(1) A testator bequeathed an article to A. He subsequently took the article on a voyage. The ship was lost, the article perished and the testator was drowned. The article was insured. A claimed the insurance money. *Held*, he was not entitled. The bequest was adeemed as it could not be shown that the testator died before the article perished(m).

(2) A testator made the following bequest :—“ To A, now at school, my capital stock of £1,000 in the India Company's stock.” The testator afterwards sold the stock. *Held*, bequest adeemed(n).

(3) A testator gave certain debentures of a company upon certain trusts. After the date of the will the testator exercised the option given to him by the company who had issued the debentures and converted them into debenture stock of the same company. *Held*, the legacy was adeemed and the debenture stock did not pass(o).

(h) *Barker v. Rayner*, 2 Russ. 122.
 (i) *Harrison v. Asher*, 2 De. G. & Sm. 436.
 (j) *In re Bagot's Settlement*, 31 L. J. Ch. 772.
 (k) *Watts v. Watts*, 17 Eq. 219.

(l) *Townley v. Bedwell*, 14 Ves. 591.
 (m) *Durrant v. Friend*, 5 De. G. & Sm. 348.
 (n) *Ashburner v. Maguire*, 2 Bro. C. C. 108.
 (o) *Re Lane*, 14 C. D. 856.

153. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.

Non-ademption of demonstrative legacy.

[This is sec. 140 of the Succession Act X of 1865. It applies to Hindus, etc.]

A demonstrative legacy is to be paid in the first instance out of the fund pointed out for that purpose; if that fund fails, the legacy is not adeemed, but the legatee is entitled to require the executors to pay the legacy out of the general assets of the testator. But this rule will not apply if in the will there is a contrary direction(p).

Ademption of specific bequest of right to receive something from third party.

154. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(i) A bequeaths to B—

“the debt which C owes me”:
 “2,000 rupees which I have in the hands of D”:
 “the money due to me on the bond of E”:
 “my mortgage on the Rampur factory”.

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed.

(ii) A bequeaths to B his interest in certain policies of life assurance, A in his lifetime receives the amount of the policies. The legacy is adeemed.

[This is sec. 141 of the Succession Act X of 1865. It applies to Hindus, etc.]

Ademption of Specific Bequest of a Debt.—Where a debt due from a third person to the testator is bequeathed specifically and the testator recovers the debt in his lifetime, the legacy is adeemed and if he recovers a portion of the debt, the legacy is adeemed *pro tanto* (sec. 155) whether the debt is paid by the debtor voluntarily or not(q).

The bequest must be specific to make the section applicable. If the subject of the gift is not a right to receive something of value, *i.e.*, if it is not a debt *qua* debt but a gift of a sum of money, *e.g.*, a gift of “whatever sum may be received from my claim on A” and the testator recovers the claim and *sets it apart* from the general mass of his property, the legacy is not adeemed. But if he mixes it up the legacy is adeemed, (see sec. 162).

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

155. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Illustration.

A bequeaths to B “the debt due to me by C”. The debt amounts to 10,000 rupees. C pays to A 5,000 rupees the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

[This is sec. 142 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section follows from the previous section. A partial receipt by the testator of a portion of the debt, specifically bequeathed will operate as an *ademption pro tanto*(r). A specific bequest of a mortgage amount is adeemed if the mortgage is redeemed although the same amount may have been reinvested in another mortgage(s).

156. If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an *ademption* only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Ademption pro tanto by testator's receipt of portion of entire fund of which portion has been specifically bequeathed.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

[This is sec. 143 of the Succession Act X of 1865. It applies to Hindus, etc.]

The distinction between this section and the previous section is that under sec. 155 the *entire* fund is specifically bequeathed, whereas under this section a portion of the entire fund is specifically bequeathed. This section lays down that if the testator receives a portion of the fund, what will remain of the fund will first go towards the payment of the specific legacy. The illustration to the section further provides that if the residue of the fund falls short of the amount specifically bequeathed, the specific legacy will be *pro tanto* adeemed and the specific legatee will only be entitled to the balance of the fund.

157. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

[This is sec. 144 of the Succession Act X of 1865. It applies to Hindus, etc. In the illustration the figure 5,000 rupees originally occurred. It was amended by Act X of 1927, sec. 2, Sch. I.]

The distinction between this section and section 151 is that under section 151 the fund out of which the two legacies, *viz.*, specific legacy and demonstrative legacy is from the beginning insufficient to pay both the legacies. In such a case the order

(r) *Ashburner v. M'Guire*, 2 Bro. C. C. 108.

Fletcher, 38 Ch. D. 373.

(s) *Gardner v. Hatton*, 6 Sim. 98; *In re*

of payment is as indicated in the commentary to that section. Under this section the fund becomes insufficient by reason of the testator receiving a portion of that fund ; in such a case also the order of payment is the same as under section 151, (see also sec. 329).

Ademption where stock, specifically bequeathed, does not exist at testator's death.

158. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—

“my capital stock of 1,000l. in East Indian Stock”:

“my promissory notes of the Central Government for 10,000 rupees in their 4 per cent loan”.

A sells the stock and the notes. The legacies are adeemed.

[This is sec. 145 of the Succession Act X of 1865. It applies to Hindus, etc. The words “Central Government” in the illustration have been substituted for the words “Government of India” by Government of India (Adaptation of Indian Laws) Order 1937].

Stock.—Under this sec. if the stock specifically bequeathed is sold by the testator, the legacy is adeemed. But sec. 166 shows that the legacy is not irretrievably adeemed and that it would be revived by a new purchase of similar stock by the testator. Sec. 165 also shows that when the testator lends “the stock specifically bequeathed on condition that it be replaced the legacy is not adeemed”; and sec. 163 provides that no ademption will take place when the stock specifically bequeathed is exchanged by act of law. Sec. 159 deals with the bequest of stock which exists only in part.

Examples.

(1) A by his will made in 1911 gave certain shares to B specifically. By an agreement dated 13-12-27 the testator granted to H for consideration an option to be exercised within one month of the testator's death to purchase the said shares. The testator died on 31-1-30. On 18-2-30 H gave notice to the executors of his intention to exercise the option. *Held*, shares were adeemed(t).

(2) A testator by his will bequeathed certain securities “or the investments representing the same at my death if they shall have been converted into other holdings” to A. One of the named securities was redeemed during the testator's lifetime and he deposited the sum so realised in the bank. *Held*, there was no ademption of the bequest(u).

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death.

159. Where stock which has been specifically bequeathed exists only in part at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B his 10,000 rupees in the 5½ per cent loan of the Central Government. A sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

[This is sec. 146 of the Succession Act X of 1865. It applies to Hindus, etc. The words “Central Government” in the illustration have been substituted for the words “Government of India” by Government of India (Adaptation of Indian Laws) Order 1937.]

Ademption of Specific Bequest of Stock.—When stock specifically bequeathed only in part exists at the testator's death, the legacy will be partially adeemed and the specific legatee will get so much of the legacy as is not adeemed.

(t) *In re Carrington, Ralphs v. Swithenbank*, (1932) 1 Ch. 1.
(u) *In re Lewis's Will Trusts, O'Sullivan v.*

Robbins, (1937) 1 Ch. 118. (See also *In re Gage, Crozier v. Gutheridge*, (1934) 1 Ch. 536 cited under sec. 142.

160. A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Non-ademption of specific bequest of goods described as connected with certain place, by reason of removal.

Illustrations.

(i) A bequeaths to B "all my household goods which shall be in or about my dwelling-house in Calcutta at the time of my death." The goods are removed from the house to save them from fire. A dies before they are brought back.

(ii) A bequeaths to B "all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed.

• [This is sec. 147 of the Succession Act X of 1865. It applies to Hindus, etc.]

Ademption by Removal.—This section is an exception to the general rule that a bequest of a thing where the thing bequeathed is described as connected with a certain place, is adeemed by the removal of that thing from that place. This section lays down that the removal will not amount to ademption, if—

- (a) the removal is from any temporary cause, or
- (b) the removal is fraudulent, or
- (c) the removal is without the knowledge or sanction of the testator.

Examples.

(1) A testator bequeathed all his household goods, plate, linen, china, etc., which should be in or about his dwelling house at B at the time of his death to A. The testator afterwards took another house into which he removed his furniture from the house at B. *Held*, legacy adeemed by removal(v).

(2) A testator bequeathed to his wife the lease of his house in B Street and the household furniture, plate, pictures, etc., therein. The lease expired and the testator sold a part of the furniture and removed the remainder to another house. *Held*, legacy adeemed. The testator had made the bequest with reference to the lease and consequently the bequest failed by change of circumstances(w).

(3) A testatrix who owned conversion stock had given a mandate to the Bank of England where the stock was deposited to pay interest to her account at Grindley's Bank. By her will she gave all the stocks, shares and moneys standing in her name or at her disposal "in the care custody or possession of Grindley's Bank" to her nephews. After the date of her will an order was made in lunacy proceeding appointing receiver of estate and the stock in question was transferred into Court *Held* that this was not a temporary removal and the bequest was adeemed(x).

161. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

When removal of thing bequeathed does not constitute ademption.

Illustrations.

(i) A bequeaths to B "all the bills, bonds and other securities for money belonging to me now lying in my lodgings in Calcutta." At the time of his death, these effects had been removed from his lodgings in Calcutta.

(v) *Heseltine v. Heseltine*, 3 Madd. 276.
(w) *Colleton v. Garth*, 6 Sim. 19.

(x) *In re Palmer*, (1944) 1 Ch. 375 [in appeal (1945) 1 Ch. 8.]

(ii) A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(iii) A bequeaths to B all his goods on board a certain ship then lying in the river Hughli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

[This is sec. 148 of the Succession Act X of 1865. It applies to Hindus, etc.]

Where the connection with a place where the thing bequeathed is situate is not a vital part of the description but if the place is only referred to in order to complete the description, the removal of the thing bequeathed from that place is not an ademption. In all such cases it is only a question of construction(y). If the locality referred to is not essential to the bequest but is merely descriptive the bequest is not adeemed.

Example.

A testator bequeathed to his wife, "All my interest in my house at L Street, furniture, books, plate, etc." He afterwards removed his furniture to another street and purchased more articles. *Held*, legacy to wife not adeemed. Here the mention of the house was merely to complete the description of the legacy and the locality was not essential to the bequest(z).

162. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.

[This is sec. 149 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section must be distinguished from sec. 154. Under sec. 154 the thing specifically bequeathed is the right to receive something of value. Under this section the thing bequeathed is not the right to receive something of value but money or other commodity. Under sec. 154 if the testator receives in his lifetime the thing specifically bequeathed the bequest is adeemed. Under this section the bequest is only adeemed if the testator mixes up the thing bequeathed with his general estate. In all such cases the first question is that of construction—what the testator is describing or dealing with(a).

163. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Change by operation of law of subject of specific bequest between date of will and testator's death.

(y) *Domville v. Taylor*, 32 Beav. 604.
(z) *Norris v. Norris*, 2 Coll. 719

(a) *Harrison v. Jackson*, (1877) 7 Ch. D. 339.

Illustrations.

(i) A bequeaths to B "all the money which I have in the $5\frac{1}{2}$ per cent loan of the Central Government". The securities for the $5\frac{1}{2}$ per cent loan are converted during A's lifetime into 5 per cent stock.

(ii) A bequeaths to B the sum of 2,000*l.* invested in Consols in the names of trustees for A. The sum of 2,000*l.* is transferred by the trustees into A's own name.

(iii) A bequeaths to B the sum of 10,000 rupees in promissory notes of the Central Government which he has power under his marriage settlement to dispose of by will. After wards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

[This is sec. 150 of the Succession Act X of 1865. It applies to Hindus, etc. The words "Central Government" in illustrations (i) and (iii) have been substituted for the words "Government of India" by the Government of India (Adaptation of Indian Laws) Order 1937].

There will be no ademption when stock is exchanged by the act of law or where the stock is transferred by the trustee to the name of the beneficiary without the knowledge or authority of the testator (see ill. ii) or by one trustee to another(b). According to English law where a change is effected by an Act of Parliament, ademption will follow unless it can be shown that the change is a change in name and form only and the thing specifically bequeathed exists substantially, though in a different form(c).

Example.

A testator by his will gave his ten £4 fully paid ordinary shares in a company to N. Between the date of the will and the death of the testator, the company went into voluntary liquidation for the purposes of reconstruction and as so reconstructed was incorporated in the same name. Under the scheme of reconstruction the testator became entitled to two £5 fully paid preference shares and two £5 fully paid ordinary shares in the new company for every £4 ordinary shares he held in the old company, but in all other respects the new company was substantially the same as the old company. *Held*, there had been no ademption and that N was entitled to the substituted shares in the new company(d).

Execution of the provisions of any Legal Instrument.—If under the articles of partnership there is a provision for renewal of partnership if a partner by his will bequeaths his share of profit and on the expiry of the partnership agreement new articles are entered into by which his share of profits is altered the legacy is not adeemed(e). (See Williams on Executors, 11 Edn., p. 1066.)

164. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Change of subject without testator's knowledge.

Illustration.

A bequeaths to B "all my 3 per cent Consols." The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

[This is sec. 151 of the Succession Act X of 1865. It applies to Hindus, etc.]

An unauthorised act of the testator's agent cannot work as an ademption. The law will not permit a fraudulent transaction to operate to the prejudice of the legatee. When the stock which was specifically bequeathed was sold during the testator's

(b) *Dingwell v. Askew*, 1 Cox. 427; *Re Johnstone's Settlement*, 14 C. D. 162.

(c) *Re Slater*, (1907) 1 Ch. 665; *Re Gillins*, (1909) 1 Ch. 345

(d) *In re Leeming, Turner v. Leeming*, (1912) 1 Ch. 828.

(e) *Re Russell*, 19 Ch. D. 432.

lunacy by his son, it was held not adeemed(*f*); but where the stock was sold under an order in the lunacy proceedings, the bequest was held to have been adeemed(*g*).

Stock specifically bequeathed lent to third party on condition that it be replaced.

165. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed.

[*This is sec. 152 of the Succession Act X of 1865. It applies to Hindus, etc.*]

Where the testator lends the stock specifically bequeathed on condition of its being replaced, the bequest is not adeemed. Here the testator continues to be the owner of the stock, notwithstanding the loan of it; and although it be not literally existing in his possession at his decease, he is substantially and beneficially possessed of it at that period. In order that this section may apply two requisites must be fulfilled, (1) there must be an agreement to replace the stock and (2) the stock is replaced before the death of the testator, (see Roper on Legacies, 3rd Edn., p. 292).

Where a testator pawns or pledges goods specifically bequeathed, and the pawn or pledge is not redeemed in his lifetime, then sec. 167 will apply. A right of redemption is left in the testator which passes to the legatee at his death.

Stock specifically bequeathed sold but replaced, and belonging to testator at his death.

166. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

[*This is sec. 153 of the Succession Act X of 1865. It applies to Hindus, etc.*]

This section lays down the rule in *Partridge v. Partridge(h)*, that if a testator disposes of the stock specifically bequeathed, but purchases an *equal* quantity of the *same* stock, the legatee will be entitled to the stock so purchased and there will be no ademption of the legacy. The reason of the rule is the presumed intention of the testator that the legatee should have the bequest. In order that this section may apply two essential conditions must be fulfilled:—

(1) The repurchase must be of the same kind of stock, and not some other kind of stock(*i*), and

(2) the repurchase must be of the equal quantity of the stock previously sold.

Revival of Adeemed Legacy by Codicil.—A confirmation or republication of will by codicil will not revive an adeemed legacy(*j*); but if between the ademption and such republication, the testator has acquired property answering the description of the adeemed legacy, the legatee will probably be entitled to the bequest under this section(*k*).

CHAPTER XVII.

Of the Payment of Liabilities in respect of the Subject of a Bequest.

167. (1) Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless

Non-liability of executor to exonerate specific legatees.

(*f*) *Jenkins v. Jones*, 2 Eq. 323.

(*g*) *Jones v. Green*, 5 Eq. 555.

(*h*) *Cas. temp. Talb.* 226.

(*i*) *Re Gibson*, 2 Eq. 669.

(*j*) *Drinkwater v. Falconer*, 2 Ves. Sen. 623, 626.

(*k*) *Alford v. Earle*, 2 Vern. 208.

a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(i) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(ii) A bequeaths to B a zamindari which at A's death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

[This is sec. 154 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section is based on the principle of the English Statute 17 & 18 Vict. c. 113 sec. 1, (Locke King's Act). But the English Statute was only confined to immoveable property. The Administration of Estates Act, 1925, incorporated the provisions of that Statute with slight alterations. This section applies to both moveable as well as to immoveable properties, (see illustrations).

According to this section the specific legatee whether of moveable or immoveable property has no right to have his specific legacy freed from the debt or liability to which it is subjected by the testator but if he accepts the bequests, he must pay the amount of the pledge or incumbrance himself unless there is a contrary intention in the will(l) and a personal obligation is imposed on the legatee on the executor's assent being given to discharge the liability(m).

Sub-Section (2).

As to what would amount to a contrary intention within the meaning of this section, it has been a difficult question to determine. By sub-section 2 it is provided that a general direction for the payment of the debts of the testator shall not be deemed to be a declaration of a contrary intention unless such intention shall be further declared by words expressly or by necessary implication referring to all or some of the debts charged by way of mortgage. A direction that the debts should be paid out of a particular fund would be a sufficient indication of a contrary intention. The contrary intention according to this section is to be ascertained by referring only to the will. Under English law it may be ascertained by referring to the deed of mortgage or other writing connected with the specific gift(n). The words used in the Locke King's Acts are "Will or Deed or other document." Subject to this difference the cases decided under the Locke King's Acts with regard to "contrary intention" may be taken as a guide.

(l) *In re Turner, Tennant v. Turner*, (1938) 1 Ch. 593.

(m) *In re Lester, Lester v. Lester*, (1942) 1 Ch.

324.

(n) *Campbell v. Campbell*, (1898) 2 Ch. 206.

Where several properties are comprised in one mortgage and are devised to different devisees, the devisees must, in the absence of a contrary intention, bear the debt rateably, (see Halsbury, Vol. 14, p. 343).

Explanation.

This *Explanation* has been added to explain that in the case of a specific bequest of immoveable property the liability to pay land revenue or ground rent although they are a charge on the property is not an incumbrance within the meaning of this section. The payment of such land revenue or rent is regulated by section 169.

Completion of testator's title to things bequeathed to be at cost of his estate.

168. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(i) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.

(ii) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

[This is sec. 155 of the Succession Act X of 1865. It applies to Hindus, etc.]

Completion of testator's title to a thing bequeathed.—Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the *cost of the testator's estate*. For example, where the testator has contracted to purchase a property which he bequeaths specifically but dies before the conveyance is signed, the executors must pay the purchase-money and obtain a conveyance. Where the testator has contracted to purchase certain shares of a company which he bequeaths specifically, if any payments are necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate, (ill. ii., sec. 170). But if he is a complete shareholder, all *calls* made after his death ought to be borne by the specific legatee, (ill. iii., sec. 170).

Similarly where a person has entered into a contract for the erection of a building and the building is not completed at the date of his death, the devisee of the land is entitled, subject to the terms of the will, to have the building, completed at the expense of the estate applicable to the discharge of the testator's debts(o), (Halsbury, Vol. 14, p. 380). The case of *Cooper v. Jarman* was distinguished in *Ahmed Angulla v. Estate and Trust Agencies Ltd.*(p). In this case the intestate had entered into a contract for the erection of a building on his land and the building was incomplete at his death. His administrator carried out the contract and got the building completed. For the payment of the cost of construction the administrator mortgaged the intestate's other property and paid interest to the mortgagee. In taking accounts objection was taken to two items: (a) the amount paid to the contractor for completing the building and (b) interest paid to the mortgagee. It was held that it was the duty of the legal representative to perform the contract of his intestate and not to break it and both the items were allowed in the accounts.

If before the assets are got in the legatee pays for the thing bequeathed out of his own pocket, he may afterwards call on the testator's representative to reim-

burse him(*g*). If the estate of the testator is insufficient to perform the contract and the agreement is on that account rescinded, the devisee will be entitled to the moneys as far as they go and it has been decided that on the subsequent coming in of the assets, the devisee of the property contracted to be purchased might compel the executor to lay out the purchase-money in the purchase of another property for his benefit(*r*). But if a good title cannot be made out the devisee of the land agreed to be purchased will not be entitled to the purchase-money or to have any other estate bought for him(*s*).

Example.

A takes a lease of a certain land with a covenant to build on the land within a certain time. A commences to build but dies before the building is completed, leaving the covenant unperformed in part. A bequeaths all his interest in the lease-hold land to B. B, if he accepts the bequest, must fulfill the covenant and complete the building. The general rule is that the legatees of leasehold estates must take them *cum onere*(*t*).

169. Where there is a bequest of any interest in immoveable property in respect of which payment in the nature of the land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

Illustration

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate will make good 25 rupees in respect of the rent.

[This is sec. 156 of the Succession Act X of 1865. It applies to Hindus, etc.]

Apportionment of Land Revenue and Rents and Taxes.—In case of bequests of an immoveable property, the rents and taxes in respect of that property upto the time of the testator's death should be paid out of the testator's estate, and the taxes, etc., after the death of the testator should be paid by the legatee. The same rule of apportionment is laid down in sec. 36 of the Transfer of Property Act. Under section 169 it is the land revenue and rent that are directed to be apportioned. Under the Transfer of Property Act the apportionment applies to rent, annuities, pensions, dividends and other periodical payments.

Liability of Legal Representative to pay Income Tax Sec. 306.—

(1) Where tax has already been assessed as payable by a person and he dies, his executor, administrator or other legal representative is liable to pay the same out of his estate so far as the estate is capable of meeting the charge of income tax. The liability of the executor &c. is limited to the extent of the estate come to his hands. Sec. 24B (1) of Income Tax Act.

(2) Where the income has accrued or received by a person in whose hands it is taxable but he dies before the publication of notice under sec. 22(1) or service of notice under sec. 22(2) or sec. 34 a notice under sec. 22(2) or sec. 34 may be served on the executor, administrator or other legal representative of the deceased who is bound to comply with the same and the income of the deceased in his hand will be assessed, treating him as the assessee to all intents and purposes. He is not personally liable but the tax levied must be paid out of the estate of the deceased.

(g) *Broome v. Monck*, 10 Ves. 614.

Monck, 10 Ves. 597.

(r) *Whittaker v. Whittaker*, 4 Bro. C. C. 31.

(t) *Hickling v. Boyer*, 3 M. & G. 685.

(s) *Green v. Smith*, 1 Atk. 572; *Broome v.*

If after the issue of notice under sec. 22 (2) default is made by the representative, he is liable to penalty under sec. 28. Sec. 24B is directed to remove the obstacle of death and to substitute the particular representative as the person to be charged after taking into consideration the receipt of income.

The term legal representative has been held to include persons who claim to be in possession of the deceased's estate as heir(u).

Sec. 24B was introduced into the Income Tax Act by Act XVIII of 1933. It was necessitated by the decision of the Bombay High Court(v) which restricted the scope of definition of the word "assessee" in sec. 22(2) to a living person only.

170. In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but, if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

Exoneration of specific legatee's stock in joint stock company.

Illustrations.

(i) A bequeaths to B his shares in a certain railway. At A's death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

(ii) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(iii) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(iv) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

[This is sec. 157 of the Succession Act X of 1865. It applies to Hindus, etc.]

In this section although the word "stock" is used it means stocks and shares, (see illustration where the word "share" is used).

According to this section and the illustrations if any payments are necessary at the testator's death to constitute him a complete shareholder they must be borne by his estate, but if he is a complete shareholder all calls made after his death must be borne by the specific legatee if he accepts the bequest unless there is a contrary intention in the will. If the legatee does not accept the bequest he is not liable. It is the due date for the payment of the call which is material for the purposes of this section and not the date of issue of the notice(w), (ill. v.).

(u) *In re Keshardas Chamaria*, A. I. R. (1937) C. 583, (approved by Privy Council A.I.R. (1939) P. C. 163).

(v) *Commissioner I. T. v. Ellis*, A.I.R. (1931) B. 333.

(w) *Addams v. Ferick*, 26 Beav. 384.

CHAPTER XVIII.

Of Bequests of Things described in General Terms.

Bequest of thing
described in general
terms.

171. If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(i) A bequeaths to B a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) A bequeaths to B "my pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.

[This is sec. 168 of the Succession Act X of 1865. It applies to Hindus, etc.]

A general legacy must be provided for by the executor out of the estate.

The bequest must be described in general terms such as "a horse," "a carriage," (ill. i). In ill. (ii) the description is not general but particular and the bequest fails. As has been observed above if there is a specific legacy of any property and that property does not exist at the death of the testator, the legacy fails, (ill. ii). This section deals with general legacy. In the case of a general bequest if the assets are sufficient the executor must purchase the article for the legatee.

CHAPTER XIX.

Of Bequests of the Interest or Produce of a Fund.

Bequest of interest
or produce of
fund.

172. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interests, shall belong to the legatee.

Illustrations.

(i) A bequeaths to B the interest of his 5 per cent promissory notes of the Central Government. There is no other clause in the will affecting those securities. B is entitled to A's 5 per cent promissory notes of the Central Government.

(ii) A bequeaths the interest of his 5½ per cent. promissory notes of the Central Government to B for his life, and after his death to C. B is entitled to the interest of the notes during his life, and C is entitled to the notes upon B's death.

(iii) A bequeaths to B the rents of his land at X. B is entitled to the lands.

[This is sec. 159 of the Succession Act X of 1865. It applies to Hindus, etc. The words "Central Government" in ill. (i) and (ii) have been substituted for the words "Government of India" by Government of India (Adaptation of Indian Laws) Order, 1937.]

Bequest of Income of Property when Construed Bequest of Property itself.—This section enacts that where the interest or produce of a fund is bequeathed without any indication as to the disposal of the corpus both the corpus as well as the interest will belong to the legatee. Accordingly in *Adm. General v. Money*(x) a bequest of the "benefit interest and profit" of the fund was held to be a gift of the corpus of the fund itself.

Although this section speaks of a *fund* it applies to immoveable property(y). (See ill. iii). This section enacts that a gift of income of property to a person,

(x) 15 Mad. 448.

(y) *Adm-General v. Hughes*, 40 Cal. 192 at

p. 214; *Abiba Ali v. Alhaji*, A. I. R. (1942) P. C. 69.

without limitation as to time is a gift of the capital when no other disposition of capital is made(z). According to English law also a devise of the income of land for an indefinite time passes the fee simple(a) and an unlimited bequest of interest of stock was held to pass the stock itself(b).

This is merely a rule of construction to be read only with reference to the other parts of the will and is applicable only when the testator has given no indication for reading his will otherwise(c).

Contrary Intention.—This section does not apply where there is a clear indication in the will that only the income is to be given to the legatee, e.g., a gift of income to B and C and the survivor of them indicates a contrary intention, and B and C will take only a life interest(d). In *Damoderdas v. Dayabhai*(e) the testator gave the income of his house to his two sons in the event of his wife's death and provided that the heirs of the sons should also enjoy such income. It was held by the lower Court that there was sufficient evidence of contrary intention within the meaning of this section restricting the interest of the sons for life but this decision was reversed by their Lordships of the Privy Council and it was held that the sons took an absolute interest. In *Anandrao v. Adm. General of Bombay*(f) a Hindu testator appointed his two sons trustees of his immoveable properties in Bombay with the following directions, "With regard to the rents and profits of the aforesaid trust property after the expenses shall have been deducted therefrom the balance that may remain over is to be used and enjoyed by my said trustee my son Bhai Govardhandas in such manner as he may think fit." At the end of the will the testator added a clause to the effect that the property should not be sold but that after the lifetime of Govardhandas and his male issue the property should be divided and given to Govardhandas' son's sons on their attaining 21. The bequest to Govardhandas sons' sons was void. It was held that the very clause vesting the property in trustees afforded indication that the testator did not intend Govardhandas to take the property absolutely and that intention was placed beyond doubt by the terms of the clause added at the end of the will.

CHAPTER XX

Of Bequests of Annuities

173. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(i) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(ii) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(z) *Manu Lal v. Lachman Das*, A. I. R. (1932) A 476.

(a) *Mannox v. Greener*, L. R. 14 Eq. 456, referred to in *Goswami Shri Girdharji v. Madhavdas Premji*, 17 Bom. 600 at p. 616 and *Shookmoy Chander v. Monohari Dass*, 7 Cal. 269 at p. 279 where the rule was not applied.

(b) *Stretch v. Watkins*, 1 Madd. 253.

(c) *In re Coward*, 57 L. T. 285.

(d) *Blann v. Bell*, 2 De G. M. & G. 775; *Madakini v. Anubala*, 3 C. L. J. 515; *Vithaldas v. Thacker Gordhandas*, 14 Bom. 361; *Karsondas v. Ladkavahu*, 23 Bom. 271.

(e) 25 I. A. 128, 22 Bom. 833 (P. C.)

(f) 20 Bom. 452.

(iii) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

[This is sec. 160 of the Succession Act X of 1885 with slight verbal amendment. In sec. 160 the following words occurred: "And this rule shall not be varied by the circumstance that." Instead of these words the word "notwithstanding" is substituted. The effect is the same. It applies to Hindus, etc.]

Bequest of Annuities.—An annuity is described as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only. (Williams on Executors, 12th Edn., p. 503). Annuities are of three kinds: (1) for a term, (2) for life, (3) perpetual. This section deals with the second kind of annuity which is the most common form of annuities.

(1) **Annuity for a Term**:—In this category are included annuities given for a specific purpose *e.g.*, for education and they cease to be payable when the purpose for which the annuities are to be given cease. In *Madhusudan v. Krishikesh(g)* the testator by his will directed that an allowance of Rs. 50 per month be paid to his daughter till such time as her sons attained majority and her daughters were married and it was held that the allowance ceased on the death of her daughter, although her sons had not attained majority and her minor daughters were not married. But an annuity given for maintenance and education is an annuity for life and is not limited to minority only(h). An annuity given to an executor for his trouble ceases when his duties as executor cease.

(2) **Annuity for life**:—*Prima facie* a simple bequest of an annuity to A is an annuity for life of the legatee in the absence of a contrary intention. If a longer period is claimed the claimant must establish it(i), (Halsbury, Vol. 28, p. 195), (see *ills. i., ii., iii.*). But where the bequest is a *gift of property* which will produce the amount of the annuity, in other words, when the will dedicates the *corpus* of a fund to the purchase of an annuity, the annuity is perpetual, and the annuitant is entitled, at his option, to have an annuity purchased for him or to receive the money appropriated for that purpose by the will. (See *ill. i., sec. 174*). To make an annuity perpetual there must be express words to that effect or some indication in the language of the will to show that the testator so intended it.

In *Agnew v. Matthews(j)*, a testator directed that "a monthly stipend of Rs. 15 be paid to my daughter E for her benefit and Rs. 20 for the benefit of her two children during their minority," and a similar annuity to his other daughter M. The testator further provided that in the event of the demise of any child of the daughters, Rs. 10 to cease rateably as being the allowance for each child; that on each child attaining the age of 21 the executors should pay to each of them severally the full amount of interest accruing from the estate and after their demise the said interest was likewise to be given to their heirs in succession. It was held that the daughters E and M took the annuities for life, that E and M were entitled to receive during the lifetime and minority of their respective children the monthly sum of Rs. 10 for each child, that upon each child attaining majority the payment in respect of such child ceased.

A bequest of an annuity to two persons for their lives will go to the survivor for his life(k). Also, if an annuity is given to one person for life and then to another, both take the annuities for life, (*ill. iii.*). The mere circumstance of the continua-

(g) (1944) All. 209.

(h) *Williams v. Jodrell*, L. A. 13 Ch. D. 564;

In re *Booth*, *Booth v. Booth*, (1894) 2 Ch.

282; *Hall v. Christian*, 17 Eq. 646.

(i) *Gopal Krishna v. Ramnath*, 5 Bom. L. R.

729.

(j) 1. M. H. C. R. 17.

(k) *Day v. Day*, *Kay*, 708; *Moffat v. Burnie*,

18 Beav. 211.

tion of the annuity after the life of the first grantee cannot afford any indication that the annuity is perpetual.

Perpetual Annuity :—An annuity is perpetual when the legatee is at his option entitled either to have the annuity purchased for him or to receive the corpus directed to be appropriated for the purchase of it, (see sec. 174). An annuity is perpetual only in those cases where it is a charge on a specific property or where the will directs that an annuity shall be provided out of the proceeds of property generally. In such cases the law assumes that it is not the annuity alone but the property itself is bequeathed. Where an annuity is given to a person and his "poutre poutradi krame" the legatee takes an estate of inheritance and if he dies before the testator the legacy lapses(l). To make an annuity perpetual there must be express words in the will so describing it. The most common indication is direction in the will to segregate a portion of the property for appropriating it towards the purchase of the annuity(m) (See Williams on Executors, 12th Edn., p. 770). The latter portion of the section provides that the mere fact that the annuity is directed to be paid out of the property generally, or even if a sum is bequeathed to be invested in the purchase of it will not by itself make it a perpetual annuity.

"Notwithstanding that etc."

This portion of the section is at variance with the English law. According to this section an annuity will be for life only even if it be directed to be paid out of property generally or even if a sum of money is directed to be invested in the purchase of it. Under English law the annuity would be perpetual in such cases(n), (Halsbury, Vol. 14, Hailsham Edition, pp. 339-340).

It is difficult to reconcile the rule laid down in sec. 174 where the same words occur with the expression used in this section. This sec. enacts that notwithstanding the fact that the annuity is directed to be paid out of the property generally or a sum is bequeathed for the purchase of an annuity the annuity is for life only; whereas under sec. 174 it is enacted that where the will directs that the annuity shall be provided out of the proceeds of the property or where a sum is bequeathed to be invested in the purchase of an annuity the annuity is perpetual and the legatee is, at his option, either to take the annuity or the corpus. According to English law in such cases the annuity is perpetual.

"Contrary Intention."

An annuity bequeathed to a person is perpetual when the will contains its perpetual continuance after his death, e.g., "to A and/or his heirs." Again, an annuity is perpetual where the words amount to a gift of the income of a particular fund without limit of time, (see Halsbury, Vol. 28, p. 196).

Limitation :—An application for payment of annuity governed by Act, 123 of the Limitation Act(o).

Income Tax on Annuity.—Ordinarily the annuitant pays the income tax on the amount of the annuity. But if the annuities are given "free of all the duties," it is free of income tax(p). In *Re Eves* (q) it was held that if annuity is given "free of all duties and free of income tax that does not entitle the annuitant to keep the income tax recovered on the annuity. But the House of Lords by a majority decided the other way(r). Their Lordships held by a majority of three to two that when an annuity is given free of tax, the amount of tax is taken to be an additional gift and that this additional sum became in law a part of the annuitant's

(l) *Saroda Prasad v. Debendra Nath*, A. I. R. (1940) Pat 257.

(m) *Panchu Gopal v. Kalidas*, 24 C. W. N. 592.

(n) *Dawson v. Hearne*, 1 Russ. & M. 606.

(o) *Anandi v. Kishori*, A. I. R. (1940) Pat.

254.

(p) *In re Comkshaw*, (1939) 1 Ch. 654.

(q) (1931) 1 Ch. 969.

(r) *Commissioner of Income Tax v. Cook*, (1945) T. R.

income and the annuitant could keep it. In all such cases the question is of construction. The construction usually turns on the word "deduction" In *In re Best(s)* the expression "free of all deduction" was held not to free the person from having to pay the income tax. In *In re Skinner, Mibourne v. Skinner(t)* Morton, J., has laid down the following rules :—

(1) The first rule is that if a testator directs payment of an annuity out of the income of his estate the annuity is not payable free of income tax, unless there is a direction in the will to that effect. If there is no such direction, the income tax is payable by the annuitant.

(2) It makes no difference to the application of that rule if, in fact, the annuity is paid out of the income from which income tax has been deducted at the source before it reaches the testator.

(3) It is not sufficient to use the words "clear annuity."

(4) It is not a sufficient direction to give an annuity "free of all deductions."

His Lordship expressed a hope that in future if a testator desires to free all annuitants from the payment of income tax, he will use the words "free of income tax" and if he does not desire the words "income tax" to include sur-tax will add the words "but not free of sur-tax."

174. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death, the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity.

Illustrations.

(i) A by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him or to receive such a sum as will be sufficient for the purchase of such an annuity.

(ii) A bequeaths a fund to B for his life, and directs that after B's death, it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

[This is sec. 161 of the Succession Act X of 1865. It applies to Hindus, etc.]

This sec. is based on the statement of law in Williams on Executors, 12th Edn., pp. 771-772 where it is stated that when a sum of money is bequeathed to be laid out in the purchase of an annuity for the life of the legatee, if the legatee survives the testator he is entitled to take the sum or to have it laid out in an annuity. If the legatee dies before the sum is laid out or before the will is proved or even before the fund is available the legacy vests at the testator's death and the sum belongs to the legal representations of the legatee.

The first portion of the section corresponds to the last portion of sec. 173. In the case of an annuity for life, if the legatee dies in the lifetime of the testator, there is no question of the vesting of the legacy, as in such a case the legacy lapses(u). But in the case of perpetual annuity this section will come into operation and the legacy vests in the legatee on the testator's death.

(s) (1941) W. N. 226. (See also *In re Hirst, Public Trustee v. Hirst*, (1941) W. N. 234.)
(t) (1941) W. N. 241.

(u) *Saroda Prasad v. Debendra Nath*, A. I. R. (1940) Pat 257.

175. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

Abatement
of annuity.

[This is sec. 162 of the Succession Act X of 1865. It applies to Hindus, etc.]

The annuity is a general legacy. Therefore as between annuitants and legatees there is no priority. If a testator has bequeathed annuities and pecuniary legacies and his estate is insufficient to pay the legacies and the annuities in full, the annuities have to be valued and the amount of the valuation should be treated as a legacy and all the legacies abate proportionately. The abated amount of the valuation should be paid to the annuitant.(v). The principle equally applies whether the annuity commences immediately on the death of the testator or at a future period(w). But if there is a gift of an annuity and a residuary gift, the annuity takes precedence (see sec. 176).

Valuation of Annuity.—As regards valuation of annuities, the rule is to ascertain the value of each annuity as at the death of the testator. But where the estate is only ascertained at some point of time after the testator's death to be insufficient, and a distribution has gone down to that point, the rules for valuation are stated in Halsbury, Vol. 28, Halsham Edition, p. 218, as follows :—

(1) If all the annuitants are living at that point of time, there must be ascertained, in the case of each annuitant, the arrears then due to him and the then present value of future payments. These two sums must be added together, and the funds available for payment of annuities must be divided between the annuitants in the proportion which the aggregate amounts bear to each other.

(2) If all the annuitants are dead at that point of time, there must be ascertained in the case of each annuitant the arrears then due to their respective estates, and the funds must be divided in the proportion of those arrears.

(3) If some of the annuitants are dead at that point of time and some are living, the values of the annuities of those annuitants who are dead must be fixed at what they would have actually received had the estate not been insufficient; and the values of the annuities of those annuitants who are living at that point of time must be ascertained by adding to then present value of future payments the amount of the arrears then due. The funds must be divided in the proportion of those values.

In Re. Ball(x) it was held that the general rule for valuation of the annuity was that they are to be valued as at the date of the order and not as at the date of the death of the testator and this decision was followed in *Re Twiss*(x¹).

Where a testator bequeaths two annuities, one immediate and the other reversionary, and the immediate annuity is for some time paid in full, but the estate is subsequently found to be insufficient and such annuity remains for some time unpaid, then, in the division between the immediate and reversionary annuitants of the funds ultimately available, the immediate annuitant is not bound to bring into hotchpot his early payments in full.

(v) *In re Wilson*, (1940) 1 Ch 966.
(w) *Innes v. Mitchell*, 1 Phill. 716.

(x) (1940) All. & E. R. 245.
(x¹) (1941) 1 Ch. 141.

176. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

Where gift of annuity and residuary gift, whole annuity to be first satisfied.

[This is sec. 163 of the Succession Act X of 1865. It applies to Hindus, etc.]

This section lays down that where the initial gift of the annuity is in the form of a simple gift followed by a residuary gift, the rule is that the annuitant must be paid in preference to the residuary legatee, who can take nothing until the annuitant has been paid in full, (Halsbury, Vol. 28, Hailsham Edition, p. 224).

“The Capital of the Testator's Estate be applied for that purpose”.

As to whether an annuity should be paid out of capital or income of the testator's estate depends entirely upon the words of the will. The reported English cases on this subject are numerous and not altogether reconcilable. The question is one of construction(y). In some cases the words of the will may amount to a charge on the *corpus* of the residuary estate. In such a case the Court will set apart a fund to answer the annuity and to release the rest of the property(z). In other cases doubts may arise as to the property on which an annuity is charged, the solution of which must be found in the construction of the will. This section lays down the rule that in cases where the initial gift of an annuity is followed by a residuary gift, the annuitant has a right to have recourse to the *corpus* of the residue of the estate and this right should not be deemed to have been taken away by a direction to the trustees to set apart a fund(a). (Halsbury, Vol. 28, Hailsham Edition, p. 191).

CHAPTER XXI.

Of Legacies to Creditors and Portioners.

177. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

Creditor *prima facie* entitled to legacy as well as debt.

[This is sec. 164 of the Succession Act X of 1865. It applies to Hindus, etc.]

Bequest to Creditors.—Where a debtor bequeaths a legacy to a creditor and *there is nothing on the face of the will* to show that the legacy is meant as a satisfaction of the debt, the creditor is entitled to the legacy as well as *the debt*. “Satisfaction” is the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some existing claim which the donee has upon the donor, (Halsbury, Vol. 13, Hailsham Edition, pp. 171-172).

This is a departure from the English rule of equity “of satisfaction of debts by legacies.” The rule is established by Courts of Equity that where a debtor bequeaths to his creditor a legacy *equal* to or *greater than* the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the

(y) *In re Collier's Deed Trusts*, (1939) 1 Ch. 277.

1082.

(z) *Ladkavahoo v. Charandas*, 29 Bom. L. R.

(a) *In re Cox, Public Trustee v. Eve*, (1938) 1 Ch. 556,

legacy was meant as a satisfaction of the debt. But where the legacy is *less* than the debt it shall not be considered as a satisfaction of the debt. (See Williams on Executors, 12th Edn., pp. 843-849). In India the doctrine of satisfaction of debts by legacies is exploded by this section and the creditor is *prima facie* entitled both to the legacy as well as the debt(b). This doctrine appeared in the leading case of *Talbot v. Earl of Shrewsbury*(c). In *Chancey's case*(d) it was decided that an express direction in the will for the payment of all debts and legacies will turn the presumption the other way and both will be payable. In *Bradshaw v. Huish*(e) it was further laid down that mere general direction to pay debts was sufficient to exclude the presumption. The whole essence of this doctrine is that the debtor can be held to have offered the creditor something equivalent to his debt. It would seem, therefore, that a legacy of a smaller sum than the debt cannot be a *pro tanto* satisfaction of it. But the Indian legislature has departed from English law and according to this section whether the legacy is greater than equal to or smaller than the amount of debt, it will not be a satisfaction, unless the will clearly expresses on the face of it that the legacy is given in satisfaction of the debt.

This section was applied to the will of a Khoja(f).

This section applies to the wills of Hindus(g).

Evidence.—No extrinsic evidence under sec. 75 of the Act is admissible to prove the intention of the testator, whether the bequest is in satisfaction of the debt or otherwise. The evidence must be gathered from the will itself (Halsbury, Vol. 13, Hailsham Edition, pp. 173-174). In *Pestonji v. Framji*(h) a Parsi testator stated as follows, "my trustees shall give my brother Pestonjee Rs. 1,500 without interest and they shall get him to vacate the house which he now occupies." The testator was indebted to the legatee in Rs. 1,500 and in lieu of interest the legatee was residing in the house at a reduced rent. It was held that the legacy was not given in satisfaction of the debt and no intrinsic evidence was allowed to be given, as there was no ambiguity in the will.

Bequest to a debtor to the Estate :—There is no provision in this Act as regards bequest to a debtor of the testator. But the English law is that where the legatee of a general legacy or share of a residue is a debtor to the estate, he is not entitled to receive the legacy without bringing his debt into account and it makes no difference whether the debt is alive or barred by limitation(i) (Halsbury Laws of England Vol. 144 p. 347). This case was followed in *Lokenath Mullick v. Odoychwar Mullick*(j) where A and B who were indebted to the estate died without satisfying their debts. The descendants of A and B claimed a share in the estate of the deceased. The debts due by A and B to the estate were barred by limitation. It was held that notwithstanding the bar of limitation the descendants of A and B could not be allowed to share without first satisfying the debts due by A and B to the estate.

178. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy, as well as the portion.

Child *prima facie*
entitled to legacy
as well as portion.

(b) *Hassonally v. Popallal*, 37 Bom. 211.

(c) (1714) Prec. Ch. 394.

(d) (1717) 1 P. Wms. 408.

(e) (1889) 43 Ch. D. 260.

(f) *Hassonally v. Popallal*, 37 Bom. 211.

(g) *Rajamannar v. Venkata Krishnayya*, 25

Mad. 361.

(h) 12 Bom. L. R. 863. (See also *Namberumal v. Veeraperumal*, 59 M. L. J. 596.)

(i) *Courtney v. Williams*, (1846) 15 L. J. Ch. 204.

(j) 7 Cal. 644.

Illustration.

A, by articles entered into in contemplation of his marriage with B covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

[This is sec. 165 of the Succession Act X of 1865. It applies to Hindus, etc. See the report of the Law Commissioners, Gazette of India 1st July, 1864, p. 54.]

Satisfaction of Portions by Legacies.—A portion is a part of a person's estate which is given or left to a child or person to whom another stands in *loco parentis*. The word is specially applied to payments made to *younger* children out of funds comprised in their parents' marriage settlement and in pursuance of the trust thereof. Sec. 178 is also a departure from the English law where the rule has been established that where a parent is under obligation by articles or settlement to provide portions for his children, and he afterwards makes a provision by will for them, such testamentary provision shall *prima facie* be presumed to be a satisfaction or performance of the obligation whether the bequest is greater than, equal to, or less than the amounts of the portions. It will be considered satisfaction of the obligation either in full or in part according to circumstances. Sections 178 and 179 do away with the rule of English law based on the doctrine, "equity leans against double portions." The meaning of this phrase is that where a testator who stands in *loco parentis* to a child is under an obligation to make a provision for such child (called portion debt) and fails to do so and afterwards bequeaths by his will a legacy to such a child, equity will presume that bequest as a satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child to the prejudice of other children. If the bequest is greater than or equal to the amount of the portion debt, it is presumed to be fully satisfied. If it is less it will be satisfaction *pro tanto*. Section 179 goes further. Where there is no previous obligation but a settlement for the benefit of the legatee is made subsequent to the date of the will, even then it will not be presumed to be ademption of the legacy.

Section 178 does away with the rule of "satisfaction of portions by legacies." Section 179 does away with the rule of "ademption of legacies by portions."

No ademption by subsequent provision for legatee.

179. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(i) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(ii) A bequeaths 40,000 rupees to B, his orphan niece, whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

[This is sec. 166 of the Succession Act X of 1865. It applies to Hindus, etc. See the Report of the Law Commissioners, Gazette of India 1st July, 1864, p. 54.]

Where a father bequeaths a legacy to a child and afterwards advances or settles a portion for that child, the legacy is not thereby adeemed.

Ademption of Legacies by Portions.—This section is also a departure from English law. Under the English law in such a case the legacy is adeemed. There the rule is that where a father gives a legacy to a child it must be understood as a *portion*, although not so described in the will, and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption

of the legacy, whether the advancement is greater than, equal to, or less than the amount of the legacy. If the advancement is less, it will operate as an ademption *pro tanto*(k). This is called "rule against double portions." The rule applies to children only and not to the widow. The rule is applicable to a case of partial intestacy(l).

In construing wills of Hindus the rule of double portion may well be borne in mind as a principle of equity, justice, and good conscience in ascertaining the intention of the testator. In *Jugjivandas v. Brijdas*(m) the testator directed his executors to set apart Rs. 2,000 in favour of his son's daughter Nathi and the next day he made an entry in his account books crediting Rs. 2,000 to the account of Nathi. It was held that the two gifts were different and the legatee was entitled to both. The doctrine of advancement has no place under this Act(n).

CHAPTER XXII.

Of Election.

180. Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will.

[This is sec. 167 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to sec. 35 (I) of the Transfer of Property Act.]

A case for election arises where a testator by his will professes to dispose of something to A which in fact belongs to B and at the same time out of his own property confers a legacy on B; the literal construction of the will would allow B to keep his own property to the disappointment of A and also to allow B to take the benefit given to him by the will. But equity steps in and will not allow B to take the full benefit given by the will unless he is prepared to carry into effect the whole of the testator's disposition. B is accordingly put to his election to take either under the will or against it. If B elects to take under the will he must give his own property to A. If B elects to take against the will he forfeits all the benefits given to him by the will and A will not be disappointed; in that case A will be compensated out of the property of the testator the amount or value of the gift attempted to be given to him by the will, (sec. 181). The doctrine of election is based on the maxim, "He who seeks equity must do equity."

Cases of eccentricity on the part of the testator to dispose of somebody else's property are rare; but most of the cases on the doctrine of election arise where the testator has a power of appointment by will and he appoints such property to strangers of the objects of the power and bequeaths legacies to the objects of the power.

The Foundation and the Characteristic of the doctrine of Election.

The *foundation* of the doctrine of election is the intention of the testator, an intention which, extending to the whole disposition, is frustrated by the failure of any part, that is to say, there is a duality of gifts, or of purported gifts,—one of the gifts being to A of the testator's own property, and the other of them being to

(k) *Pym v. Lockyer*, 5 My. & Cr. 20.

(m) 7 Bom. L. R. 299.

(l) *In re Vaux, Nicholson v. Vaux*, (1938) 1 Ch. 581.

(n) *Lakshmiiah v. Kothandarama*, 29 C. W. N. 1013 (P. C.) 27 Bom. L. R. 107 (P. C.).

B of the property of A ; and its *characteristic* is that by an equitable arrangement effect is given to the whole instrument.

Requisites of the doctrine of Election.

The following essential requisites must be present to raise a case of election.

(a) The testator must by his will give something of his own to the person whose property he purports to dispose of to another. If he gives nothing of his own to the person whose property he professes to dispose of, no case of election arises(o).

(b) The property purported to be given to the stranger by the will of the testator must be something belonging to the legatee who is called upon to elect and does not belong to the testator whether the testator does or does not know that it is his own, (sec. 182). If the legatee does not claim such property as his own property no question of election arises(p).

(c) The doctrine is applicable only as between a claim under the will and a claim *dehors* the will and adverse to it. It is not applied as between two clauses in the same will(q).

The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value, (see ills. *ii.*, & *iii.*, sec. 182), and also to every species of property moveable or immovable. There is no distinction for the purposes of election between a specific legatee and a residuary legatee, or between legatees and next-of-kin of the testator(r).

The doctrine of election is not applicable when the bequest is invalid on account of incapacity to bequeath by reason of infancy, insanity, etc. The doctrine is not available to cure an illegality(s), (ill. *iv.*, sec. 182).

The doctrine of election applies to wills as well as to deeds, (see sec. 35 of the Transfer of Property Act). It was first applied in the case of wills and was extended in England from wills to conveyances and settlements.

Difference between the English and Indian Law of Election.—(1) According to English law it has been settled that a legatee by electing against the will *does not incur a forfeiture* of the benefit conferred on him, but is merely bound to make *compensation* out of it to the person disappointed by his election. Under this Act the rule is that the refractory legatee *forfeits* the legacy.

(2) There is no time fixed by law for making an election in England as is under sec. 189 of this Act.

Hindu Law and Election.—This section applies to Hindus(t). In *Somabai v. Chellam(u)* a Hindu testator after making certain provision for payment of legacies and charities directed his executors to recover the Provident Fund due to him from the telegraph department and certain sums deposited by him in Mutual Benefit Fund and a Cooperative Credit Society and his property be distributed amongst his wife and two daughters, half to the wife and one-fourth to each daughter. Under the Provident Fund Act the testator had nominated his widow as being entitled to the fund. The wife and two daughters survived the testator. After the death of the wife one of the daughters filed a suit against the surviving daughter and the executor of the will of the wife. A question was raised in the suit whether

(o) *Bristow v. Ward*, (1794) 2 Ves. 336.

(p) *Kamal v. Narendra*, 9 C. L. J. 19.

(q) *Wallaston v. King*, (1869) L. R. 8 Eq. 165.

(r) *Cooper v. Cooper*, L. R. 6 Ch. App. 19, 7 H. L. 53.

(s) *Wallaston v. King*, 8 Eq. 165.

(t) *Mangaldas v. Ranchoddas*, 14 Bom. 438; *Pramada v. Lakhi*, 12 Cal. 60.

(u) A. I. R. (1939) M. 485. (See also *Rajamannar v. Venkata Krishnaya*, 25 Mad. 261; *Suddasook v. Ram Chunder*, 17 Cal. 620).

the widow was entitled to the amount of the Provident Fund under the nomination made by the testator and also to receive half share in the property left by the testator or whether she was put to election. It was held that the Provident Fund Act applied to Government and Railway Provident Fund and to mutual benefit fund and to co-operative credit societies, that the widow was put to her election but that she had not elected during her lifetime. It was further held that the executor of the widow was to elect and he elected to take under the will and gave up his right under the nomination.

Evidence.—Parol evidence is not admissible to raise a case of election(v).

181. An interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

Devolution of interest relinquished by owner.

[This is sec. 168 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to the second part of sec. 35 (1) of the Transfer of Property Act.]

This section is a departure from English law. In England in applying the doctrine of election equity proceeds upon the principle not of forfeiture but of compensation; the legatee who elects to take against the will and wants to keep his own property is not required to abandon the benefit given to him by the will, (see Halsbury, Vol. 13, Hailsham Edition, p. 155).

According to section 180, the benefit given to the legatee must be given up by the legatee and the benefit so relinquished under sec. 180, shall devolve under this section as if it had not been given to the legatee and will fall into the residue under sec. 103, if there is a residuary bequest and if there is no residuary gift, it will go as undisposed of as on intestacy, (see ill. i. to sec. 182) subject to the charge of compensating the disappointed legatee.

182. The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Testator's belief as to his ownership immaterial.

Illustrations.

(i) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(ii) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel or to lose the estate.

(iii) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate or to lose the legacy.

(iv) A, a person of the age of 18, domiciled in British India but owing real property in England, to which C is heir-at-law, bequeaths a legacy to C and, subject thereto, devises and bequeaths to B "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

[This is sec. 169 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to sec. 35 (2) of the Transfer of Property Act.]

The application of the doctrine of election does not depend on whether or not the testator knows that he has no title to the property which he purports to dispose of. The gist of the rule of election is that the testator gives to one what belongs not to himself but to another, to whom he gives some estate of his own upon the implied condition that the other shall part with his own estate or not take the bounty. The Court does not speculate as to whether the testator would have made a different disposition had he known of his error, but takes the will as it is^(w). The application of the doctrine of election depends on the personal competency on the part of the testator of the attempted disposition as the doctrine is founded on the intention which supposes such competency, (see ill. *iv*). The inability of a Hindu widow to devise immoveable property inherited from her husband does not arise from personal incapacity to devise but it is of the same nature as that which precludes every one else from disposing by will of what does not belong to him^(x). In ill. (*iv*) the heir-at-law is not put to his election on the ground that under the old English law an infant testator was legally incompetent to devise immoveable property which devolved on the heir.

Bequest for man's benefit how regarded for purpose of election.

183. A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

[This is sec. 170 of the Succession Act X of 1865. It applies to Hindus, etc.]

To raise a question of election it is not essential that the benefit conferred on the legatee should be directly given to him by the will, *i.e.*, a legacy to A of Rs. 100/-. Even if the legacy is given indirectly to A for his benefit, *i.e.*, to pay A's debt or to his trustees upon trust for A's benefit it is a sufficient benefit and A will be put to his election. This section must be distinguished from sec. 184 where the indirect benefit is not derived from the will itself but from other circumstances, *e.g.*, by his holding different characters or different capacities.

Person deriving benefit indirectly not put to election.

184. A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B, and 1,000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

[This is sec. 171 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to sec. 35 (3) of the Transfer of Property Act.]

If the legatee derives a benefit indirectly he is not put to his election. For example, a testator bequeaths property belonging to C to B, and to D he gives a legacy of Rs. 1,000. He does not give anything to C. D afterwards purchases the

(w) *Whistler v. Webster*, 2 Ves. 367.

(x) *Mangaldas v. Ranchhodas*, 14 Bom. 488

at pp. 440-441.

property from C. D will not be put to his election(y). The doctrine of election does not preclude a party claiming by the will from enjoying a derivative interest, to which he is entitled at law under a legal estate taken in opposition to the will.

Person taking in individual capacity under will may in other character elect to take in opposition.

185. A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

Illustration.

The estate of Sultanpur is settled upon A for life, and after his death, upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.

[This is sec. 172, Clause (1) of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to 35 (4) of the Transfer of Property Act.]

Where a testator purports to dispose of property which is not his own, no case of election arises against a person who takes such property by a derivative title after the testator's death, and who is also a beneficiary under the will(z). Where the party disputes the validity of the bequest and does not claim as his own any property which the testator had disposed of no question of election arises(a).

186. Notwithstanding anything contained in sections 180

Exception to provisions of last six sections.

and 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

[This is sec. 172, Clause (2), i.e., Exception to the last six Rules of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to the Exception to sec. 35 (4) of the Transfer of Property Act.]

This section is an exception to the rule in sec. 185 that where a particular gift is expressed to be in lieu of something belonging to the legatee which is also disposed of by the will, the legatee must be put to election(b).

187. Acceptance of a benefit given by a will constitutes an

When acceptance of benefit given by will constitutes election to take under will.

election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

(y) *In re Lord Chesham, Cavendish v. Dacre*, 31 C. D. 466, 477.

(z) *Griseil v. Swinhoe*, (1869) L. R. 7 Eq. 291.

(a) *Kamal Kumari v. Narendra Nath*, 9 C. L. J. 19.

(b) *Pramada v. Lakhi*, 12 Cal. 60.

Illustrations.

(i) A is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of estate of Sultanpur Buzurg to C.

(ii) B, the eldest son of A, is the possessor of an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C.

[This is sec. 173 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to section 35 (5) of the Transfer of Property Act.]

Election by Conduct.—No person can be required to elect without a clear knowledge of both the funds and properties between which he has to elect. Election is a question of fact and must be ascertained as such. It may be express, or may be implied from the acts of the person bound to elect. This section raises a case of implied election. To constitute an implied election by reason of the acceptance of the benefit given by the will he must be shown (i) to have been aware of his right to elect (ii) to have intended to exercise such right and (iii) to have had full knowledge of such matters as the value of different properties and his own rights in respect of them, unless he has waived the inquiry which would have resulted in such knowledge. The next section enacts that such knowledge or waiver of inquiry shall in the absence of evidence to the contrary be presumed if the legatee has enjoyed for two years the benefit provided for him by the will without doing any act to express dissent. Clause (2) of sec. 188 differs from sec. 187 in that it only permits an inference(c). If he waives such inquiry, *i.e.*, if he wilfully abstains from such inquiry, election will be presumed.

No person is bound to elect without a clear knowledge of his right to elect and of the circumstances which would influence the judgment of a reasonable man in making the election(d). When a party has notice that he is bound to elect to take under or against a will and deals with the property given to him by the will as his own, that is a clear deliberate act of election to take the property so given to him. If a party acts in ignorance or through a *bona fide* mistake that will not amount to election, (*ill. i.*, sec. 187). An election once fully made is final and binds the party and his representative.

188. (1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

Circumstances in which knowledge or waiver is presumed or inferred.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B.

(c) *Indubala v. Manmatha*, 41 C. L. J. 258 at p. 279; *Triguna v. Radharani*, 87 C. L. J. 20.
(d) *Lalit Mohan v. Norodamoyi*, A. I. R. (1927) C. 494.

[Clause (1) of this section is sec. 174 and Clause (2) is sec. 175 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to section 35 (6) and (7) of the Transfer of Property Act]

Enjoyment for Two Years.—(1) If the legatee enjoys the benefit provided for him by the will without expressing any dissent for two years, acceptance will be presumed. This is only a presumption throwing the onus on the legatee of proving that he did not elect, which may be rebutted by the legatee. No such rule of two years prevails in England.

(2) Where with the knowledge of his obligation to elect, a person enjoys the property given by the will and exercises acts of ownership over it, thereby rendering it impossible to place the other donee in the same condition if such acts had not been done, he will be debarred from keeping his own property.

The presumption arising under clause (1) may be rebutted by circumstances. Clause (2) only permits an inference(e).

189. If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

[This is sec. 176 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to sec. 35 (8) of the Transfer of Property Act.]

No time is fixed for making election according to English law.

A legatee who is required to elect must be allowed sufficient time to make up his mind. The Indian Legislature has fixed one year's period as under sec. 337 the testator's estate is required to be distributed within one year. On the expiry of the year, if the legatee put to election has not signified his intention the executors shall give notice to the legatee calling upon him to make his election within a reasonable time after the receipt of the notice. If the legatee still remains silent, he shall be deemed to have elected to take under the will.

As to what is reasonable time to be given by the notice will depend on the facts of each case. If there is an administration action pending for accounts it is necessary that accounts and inquiries should finish(f).

A person required by the Court to elect within a specified time will, if he does not elect within that time, be treated as having elected against the will, (Halsbury Vol. 13, p. 125, Hailsham Edition, p. 158).

190. In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

[This is sec. 177 of the Succession Act X of 1865. It applies to Hindus, etc. This section corresponds to sec. 35 (9) of the Transfer of Property Act.]

If a person entitled to election is a minor or under any other disability, election may be postponed until his majority or his guardian may be required to elect

(e) *Indubala v. Manmatha*, 41 C. L. J. 258. (f) *Douglas v. Douglas*, (1871) 12 Eq. 617.

for him, or the Court may direct an inquiry and elect for the minor(g). (Halsbury, Vol. 13, p. 128).

In case of a lunatic so found on inquiry, his committee can elect under the direction of the Court, (Halsbury, Vol. 13, p. 127, Halsham Edition, p. 161).

CHAPTER XXIII.

Of Gifts in Contemplation of Death

Property trans-
ferable by gift
made in contem-
plation of death.

191. (1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

(3) Such a gift may be resumed by the giver ; and shall not take effect if he recovers from the illness during which it was made ; nor if he survives the person to whom it was made.

Illustrations.

(i) A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death,—

a watch ;
a bond granted by C to A ;
a bank-note ;
a promissory note of the Central Government endorsed in blank ;
a bill of exchange endorsed in blank ;
certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—
the watch ;
the debt secured by C's bond ;
the bank-note ;
the promissory note of the Central Government ;
the bill of exchange ;
the money secured by the mortgage-deeds.

(ii) A, being ill, and in expectation of death, delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents or to A's goods of bulk in the warehouse.

(iii) A, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

[This is sec. 178 of the Succession Act X of 1865. The words "Central Government" in ill. (i) are substituted for the words "Government of India" by Government of India (Adaptation of Indian Laws) Order, 1987. It does not apply to Hindus, etc.]

In order to constitute a valid *donatio mortis causa* under this Act, the following requisites must be complied with :—

(1) The property must be *moveable* and such as the donor could dispose of by will.

(2) The gift must be by a man in contemplation, though not necessarily in expectation, of death. A gift made in contemplation of suicide is not a valid *donatio mortis causa*(h).

(3) It must be conditioned to take effect only on the death of the donor. The death of the donor must ensue. It does not take effect if the donor recovers from the illness, nor if he survives the donee. It does not matter from what cause the death ultimately takes place. It is not essential that the death should ensue from the existing disorder(i).

(4) There must be delivery of the subject of donation. The deacease should at the time of the delivery not only part with the possession but also with the dominion over the subject of the gift(j). In *Delgoffe v. Fader*(k) a lady in contemplation of death gave her bag and its contents—jewellery trinkets, cash and an envelope enclosing a pass book of a bank to the plaintiff. The pass book showed £ 938 to the credit of the amount of the deceased. It was held that there was a valid *donatio* as to jewellery, trinkets, etc., but not of the moneys in the bank.

(5) The gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover(l).

A *donatio mortis causa* may be made orally or in writing with or without registration. But delivery is absolutely essential.

What property may form the subject of a *Donatio Mortis Causa*.

Any moveable property which a man may dispose of by will may be disposed of by a gift *mortis causa*. Under this Act there is no provision for a *donatio mortis causa* of immoveable property.

Sec. 191 is wider than the English law as regards moveables. Bank notes and promissory notes and other negotiable instruments which pass by delivery may be valid subjects of *donatio mortis causa*(m).

(1) **Promissory Notes of the Government of India.**—As regards promissory notes they must be endorsed in blank. Without such endorsement the mere delivery thereof is not sufficient, [see illustration (i), item (4)]. In England in *Veal v. Veal*(n) delivery of a promissory note payable to order without endorsement was held to be sufficient. Cash certificate can be the subject of *donatio mortis causa*(o). In *Kumar Upendra v. Nabin Krishna*(p) the deceased a few hours before his death and in contemplation of death caused certain Government loans to be fetched and gave them to plaintiff with the intention of passing the property to him, but he could not make the endorsement because he was too weak and it was held to be a valid *donatio*.

(2) **Cheque.**—The mere delivery of a cheque which is not paid in the donor's lifetime does not constitute a *donatio mortis causa*(q); but if the cheque is paid by the banker after the death of the donor but before the banker was informed of the death, it will operate as a *donatio mortis causa*(r). A cheque payable to the donor or order and given by the donor is a valid *donatio mortis causa*(s). (Williams on Executors, 12th Edition, p. 484).

(3) **Policy of Insurance.**—A policy of insurance may be the subject of a gift of this nature(t).

(h) *Agnew v. Belfast Banking Co.*, (1896) 2 Ir. R. 204.

(i) *Wilkes v. Allington*, (1931) 2 Ch. 105.

(j) *Reddell v. Dobree*, 10 Sim. 244.

(k) (1939) 1 Ch. 922; (1939) W. N. 303.

(l) *Cain v. Moon*, (1896) 2 Q. B. 283 at 286.

(m) *Re Mead*, 15 C. D. 651.

(n) 27 Beav. 303.

(o) *Dolly Edelwaiz v. Maelakin*, (1943) All. 193.

(p) 3 B. L. R. (O. C.) 113.

(q) *Hewitt v. Kaye*, 6 Eq. 198.

(r) *Yate v. Hilbert*, 2 Ves. 111.

(s) *Clement v. Cheesman*, 27 C. D. 631.

(t) *Witt v. Anis*, 1 Best. & Sm. 109.

(4) **Post Office Savings Bank Book.**—The delivery of a Post Office Savings Bank deposit book may constitute a good *donatio mortis causa* of the balance standing to the credit of the depositor(u). A banker's deposit note is a good subject of *donatio mortis causa*(v).

(5) **Mortgage Deeds.**—In *Duffield v. Elwes*(w), the question was whether mortgage deeds can be the subject-matter of *donatio mortis causa*. The Vice-Chancellor held that it could not be but his decision was reversed by the House of Lords.

Effect of Recovery of the Donor from the Illness.—If the donor recovers from the illness during which the *donatio mortis causa* was made, or if the donee does not survive the donor, the gift does not take effect.

How a *Donatio Mortis Causa* Differs from a Legacy.—A *donatio mortis causa* differs from a legacy in these respects:—

(1) Probate in respect of it is unnecessary, for such a gift takes effect from the date of the delivery.

(2) No assent or other act on the part of the executor is necessary to perfect the title of the donee.

How it differs from a gift Inter vivos and resembles a legacy.—(1) It is ambulatory, incomplete, and revocable during the testator's lifetime. It partakes of the nature of a will and in this respect it is different from a gift as contemplated by sec. 122 of the Transfer of Property Act. The property gifted in contemplation of death remains the property of the donor till the date of his death; the donee succeeds to the property on the death of the donor, provided the donor has not rescinded the gift in his lifetime(x).

(2) It is liable for payment of the debts of the testator upon deficiency of assets.

***Donatio Mortis Causa* according to Mahomedan Law.**—Such gifts are known to Mahomedan law(y). Gifts made by a Mahomedan during *Marz-ul-Maut* or death-illness cannot take effect beyond a *third* of the surplus of his estate after payment of funeral expenses and debts, unless the heirs give their consent after the death of the donor to the excess taking effect.

Such a gift if made to an heir is not valid unless the other heirs consent thereto after the donor's death, (Mulla's Mahomedan Law, 11th Edn., p. 122).

Delivery of possession is essential to constitute a valid gift *Marz-ul-Maut*.

If a gift is made by a Mahomedan during *Marz-ul-Maut* of the whole of his property and if the donor subsequently recovers from the illness, the gift will take effect to the extent of the whole. Not so under this Act where, if the donor recovers, the gift does not take effect.

***Donatio Mortis Causa* according to Hindu Law.**—Although this section does not apply to Hindus, *donatio mortis causa* is recognised in Hindu law(z). Hindu law makes no distinction between an ordinary gift and a gift in contemplation of death. The requisites are:—(a) giving either orally or in writing with the intention of passing the property accompanied by actual delivery and (b) the acceptance by the donee in the lifetime of the donor(a).

(u) *Re Weston*, (1902) 1 Ch. 680; *Re Andrews*, (1902) 2 Ch. 394.

(v) *In re Dillon*, (1890) 44 Ch. D. 76.

(w) 1 Bligh N. S. 497.

(x) *Dolly Edelmaitze v. Maelakin*, (1943) All.

193; A. I. R. (1943) A. 95.

(y) *Fatima Bibi v. Sheikh Ahmed Baksh*, 35 Cal. 271 (P. C.).

(z) *Bhasker v. Sarasvatibai*, 17 Bom. 486.

(a) *Visalatchmi v. Subbu*, 6 M. H. C. R. 270.

PART VII.

Protection of Property of Deceased

192. (1) If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

Person claiming right by succession to property of deceased may apply for relief against wrongful possession.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

[This is sec. 1 & 2 of the Succession (Property Protection) Act XIX of 1841.]

This Part reproduces The Succession (Property Protection) Act No. XIX of 1841. It applies to all the subjects in British India. Part VII of the Succession Act incorporates the provisions of the Succession (Property Protection) Act (XIX of 1841) otherwise known as the Curators Act, which, as the preamble shows, was an Act "for the protection of moveable and immoveable property against wrongful possession in cases of succession." Sec. 192 makes it clear that Part VII is intended to provide for a speedy relief against wrongful possession in cases of succession. This object is carried out by prescribing a summary proceeding in which the Court is to determine the right to actual possession and sec. 209 distinctly provides that the decision in such a proceeding shall have no other effect than that of settling the actual possession and shall not be subject to any appeal or review. The Legislature has contemplated a short inquiry leading upto and resulting in a rapid decision in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit(b). It was contended in this case that sec. 192 did not apply to property of a Mahant as Muth property passes on the death of the Mahant to his successor. The words "owner" and "proprietor" used in sections 195 and 205 will not strictly apply to Mahant. But these words are taken from corresponding sections 5 and 14 of Act XIX of 1841. In 1921, however, the Privy Council decided in *Vidua Varuthi's case*(c), that "much property was held by the Mahant as its owner and the successor to him in such property follows with the succession to the office." The Succession Act, 1925, was passed after the Privy Council decision but it was only a consolidating Act and Part VII merely reproduces the sections of Act XIX of 1841. This Part must, therefore, be interpreted in the light of the earlier Act of XIX of 1841. Having regard to the general scheme of the Act XIX of 1841, Muth property must be held not to be excluded from its operation. Part VII must also be held to apply to such property (See p. 211 of the report).

The object of this Part is to provide a summary procedure for the protection of property in cases of dispute as to succession. It is in the nature of an interlocutory proceeding asking the Court to determine who has the right to possession

(b) *Mahant Goswami v. Mahant Kapildeo*, 21 Pat. 197 at p. 206. (c) 44 Mad. 331 (P. C.).

pending the final determination of the right of the parties in a regular suit(d). This section applies only in cases of succession by inheritance. It has no application when the property passes by survivorship(e). But if the dispute related to an undivided share in the estate it was held in *Gopi Krishna v. Raj Krishna*(f) that the Act applied. The jurisdiction is only given to the District Judge and not to a Subordinate Judge and the procedure is by way of application which application must be made within six months of the death of the person whose estate is in question, (sec. 205). In *Mahmadbhai v. Bai Havabai*(g) the Bombay High Court deprecated the practice of proceeding under Act XIX of 1841. "It is no longer expedient that the Court should entertain proceedings under this Act.....When the parties claim the estate of a deceased person the proper course is to file an administration suit and apply for appointment of receiver." This part is designed to protect property; but it is only to be used where exceptional grounds for prompt action are necessary to guard against misappropriation, waste or neglect of the estate of the deceased(h). The provisions of this Part should not be lightly resorted to. Applications under this Part are now obsolete. As observed by Macleod, C. J., "The Act (Act XIX of 1841) is really out of date, and there is no necessity whatever of parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit and apply for the appointment of a receiver in which case the question will be who should be given possession until the dispute between the parties has been decided in that suit.Considering the wide powers that are now given to the Courts to make interlocutory orders in regular suits, an application for relief under this Act should not be entertained.It cannot be said that any person is likely to be materially prejudiced if he is told to file a regular suit because if he proceeds with ordinary diligence he can ask for relief of an interlocutory nature in that suit(i).

The condition essential for invoking the provisions of this Part is that the applicant must show that he has an interest in the estate of the deceased. To apply the provisions of this Part to the facts of any particular case it is a condition precedent that the Judge should find or be satisfied that the applicant is likely to be prejudiced if left to ordinary remedy of a regular suit and that the application is *bona fide*, (see sec. 193). The only question for the Court to consider is as to who among the rival claimants has a preferential right to possession(j). A summary order made under this Part is not a partition of the property, and the decision shall only be on the right to possession. No question of title should be determined(k). The decision of the District Judge shall be final(l), (sec. 209). But the party aggrieved shall have his ordinary remedy of establishing his title to the property in the ordinary way by instituting a suit, (sec. 208).

The word "succession" used in this section applies not only to intestate succession but also applies to testamentary succession(m). A shebait claiming under the will of the deceased was held entitled to make the application(n). But the provisions of this Part do not apply to the case of a family governed by the Mitakshara law(o).

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| (d) <i>Kothandarama v. Jagathambal</i> , A. I. R. (1923) All. 229. | C. W. N. 871. |
| (e) <i>Sato Koer v. Gopal</i> , 34 Cal. 929; <i>Puthia Purajil v. Puthia Purajil</i> , 23 M. L. J. 537. | (k) <i>Bhagwande v. Myna Bacc</i> , 11 M. I. A. 487 at p. 515. |
| (f) 12 C. L. J. 8. | (l) <i>Gajadhar v. Megha</i> , 44 All. 546. |
| (g) 26 Bom. L. R. 145. | (m) <i>Champi Devi v. Pura Bal</i> , A. I. R. (1934) L. 930. |
| (h) <i>Khoja Kutbudin v. Khoja Faizuddin</i> , 2 N. L. R. 72. | (n) <i>Benode Behary v. Rai Sundari</i> , 53 Cal. 637, 30 C. W. N. 500. |
| (i) <i>Mahmadbhai v. Havabai</i> , 26 Bom. L. R. 145. | (o) <i>Musst. Sato Koer v. Gopal Sahu</i> , 34 Cal. 929; 12 C. W. N. 65; <i>Bua Ditta v. Sahib Diyal</i> , 20 Lah. 196 A. I. R. (1938) L. 753. |
| (j) <i>Bhabatarini Devi v. Prafullu Kumar</i> , 36 | |

193. The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made *bona fide*.

[This is sec. 3 of the Succession (Property Protection) Act XIX of 1841.]

This section contemplates an inquiry into two points :—(1) whether the opposite party has lawful title and (2) whether the applicant is really entitled, whether his application is *bona fide* and whether he is likely to be materially prejudiced if left to a regular suit(p). This section requires that the District Judge shall examine the applicant on oath and hold inquiry as to whether the opposite party has lawful title and whether the applicant is entitled to present the application and whether it is *bona fide*(q). An order should only be made after such inquiry is held(r). Under the old section a statement contained in the affidavit of the applicant was held to be sufficient(s) but that is no longer sufficient under the present section. Under the old section the words used were “shall in the first place inquire by the solemn declaration of the complainant and by witnesses and documents at his discretion”. These words are substituted by the words, “shall, in the first place, examine the applicant on oath”, etc. So now under this section the examination of the applicant is absolutely necessary. The Court is no longer entitled to act upon the affidavit of the applicant.

The provision of this section is mandatory and the Judge is bound to hold an inquiry under this section before appointing a curator under sec. 195(t).

Omission to hold inquiry is a material irregularity and an application for revision will lie under sec. 115 of the Code of Civil Procedure. The words “in the first place” in this section have reference to the inquiry whether there are sufficient grounds for interference which should precede the citation of the party complained of but not to the relative sequence of steps to be taken in the conduct of the inquiry. The High Court will not interfere in revision unless it is satisfied that the person moving it has no other remedy open to him whereby he may obtain the relief sought(u).

194. If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly :

Procedure.

- (p) *Mahamadhbhai v. Bai Navabai*, 26 Bom. L. R. 145, A. I. R. (1924) B 507; *Kothandarma v. Jagatihabal*, (1923) M. W. N. 77; *Bhimappa v. Kharappa*, 34 Bom. 115, 11 Bom. L. R. 1308.
 (q) *Phul Chand v. Kishmish Koer*, 11 C. L. J. 521.
 (r) *Lila v. Mahange*, 54 All. 183.

- (s) *Gopi Krishna v. Raj Krishna*, 12 C. L. J. 8.
 (t) *Krishnasami v. Muthukrishna*, 24 Mad. 364; 7 M. L. J. 78; *Abdul Rahman v. Kutti Ahmed*, 10 Mad. 168; *Papamma v. Collector of Godavari*, 12 Mad. 341.
 (u) *Ganga Sahai v. Babu Lal*, 72 P. R. (1918).

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

[This is sec. 4 of the Succession (Property Protection) Act XIX of 1841 except that the word "summon" is substituted for the word "cite".]

The procedure laid down in this section is summary procedure and the question to be determined is the question of possession and not of title(v). Under this section it is only necessary for the Court to consider if the petitioner is really entitled to the property. The Court is to determine the right of possession to the property amongst the rival claimants and to decide who has a preferential claim. The question of title can only be decided in the regular suit. The effect of such a summary proceeding is to settle the fact of possession. If any one wants to eject the person just put in possession, he must file a regular suit in the nature of an ejectment suit and he can only recover possession on the strength of his own title. In such a case he must establish not only his own relationship with the last holder but also that no nearer heirs are alive(w). As observed by the Rt. Hon'ble Jaykar, J., in *Kartar Singh v. Dayal Das*(x), the plaintiff could succeed only on the strength of his own title and not on the weakness of his opponents.

Before proceeding under this section the District Judge must satisfy himself that sufficient ground exists, on inquiry being held under sec. 193, for him to interfere. An application ought not to be granted as a matter of course(y).

The decision of the District Judge is final and is not subject to any appeal or review, (see. sec. 209). The provision of this section is not controlled by O. 32, r. 6 of the Code of Civil Procedure. There is no provision for demanding security from the person to whom the property is ordered to be delivered.

"Subject to a suit".—These words mean subject to a suit as contemplated in sec. 203, that is, a regular suit to establish title(z). The effect of a summary decision under this section is not a bar to the regular suit and the same is expressly saved by sec. 208. According to the Full Bench decision(a) it is clear that neither section 194 nor sec. 208 makes any provision for setting aside the order made under this section.

Proviso.—Under the proviso the District Judge may direct an inventory to be taken after making the necessary inquiry. The inquiry must be made before ordering the inventory(b).

195. If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner,

Appointment of
curator pending
determination of
proceeding.

(v) *Bhugwandeon v. Myna Bae*, 11 M. I. A. 487 at p. 515.

(w) *Girdhari Lal v. Goot. of Bengal*, 12 M. I. A. 448.

(x) A. I. R. (1939) P. C. 201.

(y) *Gopi Krishna v. Raj Krishna*, 12 C. L.

J. 8; *Champi Devi v. Puran Bal*, A. I. R. (1934) L. 930.

(z) *Bhatatarini v. Profulla*, 36 C. W. N. 871.

(a) *Loknaraon v. Ranee Myna Koer*, 7 W. R. 199.

(b) *Abdulla v. Mithur*, 23 M. L. J. 537.

the District Judge may appoint one or more curators, whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof :

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator :

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

[This is sec. 5 of the Succession (Property Protection) Act XIX of 1841.]

Appointment of Curator

The necessary conditions before a curator is appointed under this Part are : (1) that the applicant must show that he has an interest in the property ; (2) that there is danger of misappropriation or waste of the property ; (3) that the applicant will be materially prejudiced if left to the ordinary remedy of a suit ; (4) that the application is *bona fide*, (sec. 193) and (5) the application is made within six months of the death of the owner of the property, (sec. 205). All these conditions must be fulfilled before a curator can be appointed(c). Before appointing the curator the Court must be satisfied that the appointment is likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application is *bona fide*(d). No curator can be appointed of a property of which there is a trust made or of any direction in respect thereof made in a will by the deceased owner of the property to take effect after his death, (sec. 206). The section requires that before appointing a curator the District Judge should ask the party in possession to give security. It is only when that party makes delay in providing security or the security is found insufficient that the Judge can pass an order appointing curator. When the party in possession was never asked to give any security, the order of appointment of curator is liable to be set aside(e).

This section does not in express terms require that the District Judge should record the grounds or findings ; it is expected that he should do so. The non-recording of such grounds is not such an irregularity as would require the interference of the Court under section 115 of the Code of Civil Procedure(f). An application for revision lies under sec. 115, from an order made under this section(g).

Proviso.—The proviso contained in the first paragraph of the section states that the authority of the curator shall continue according to the terms of his appointment but in no case beyond the determination of the summary proceedings and the confirmation or delivery of possession in consequence thereof. Until the curator has handed over possession of the property his appointment does not come to an end even though the summary proceedings have terminated and therefore he can institute a suit under section 200(h).

196. The District Judge may authorise the curator to take possession of the property either generally, or until security is given by the party in possession, or until inventories of the property have been made,

Powers confer-
able on curator.

(c) *Papamma v. Collector of Godavari*, 12 Mad. 341.

(d) *Kothandarama v. Jagatihambal*, (1923) M. W. N. 74.

(e) *Madan Gopal v. Narbada*, 11 P. R. 1915.

(f) *Lila v. Mahange*, 54 All. 183 ; A. I. R. (1931) All. 632 F. B.

(g) *Sato Koer v. Gopal*, 34 Cal. 929.

(h) *Lakhmi Chand v. Ram Lal*, A. I. R. (1931) A. 423.

or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession :

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

[This is sec. 6 of the Succession (Property Protection) Act XIX of 1841.]

Powers and duties of Curator.—He shall have power to take possession of the property, to manage the property, to recover debts and rents and to file and defend suits. The order of appointment must expressly state that the curator is empowered to recover debts and rents, (sec. 200), the power to collect debts containing by implication a power to sue for their recovery⁽ⁱ⁾. He must give security and render faithful account of his management. He shall be subject to all the orders of the District Judge. All payments made to the curator shall be valid and will discharge the person paying the same, (sec. 197, cl. 1).

Position of Curator.—His position is analogous to that of a receiver appointed by Court under O. 40, r. 1 of the Code of Civil Procedure⁽ⁱ⁾. In *Babasab v. Narsappa*^(j) it is stated that the curator appointed under Act XIX of 1841 is not a person claiming to be entitled to the effects of a deceased person whose estate he is appointed to manage within the meaning of sec. 4 of the Succession Certificate Act (VII of 1889) and that he is not required to take out a certificate under it before he can obtain a decree. He is not a representative of the deceased but is merely entrusted by the Court with certain powers over the estate for a temporary purpose.

Where, however, a succession certificate or probate, or letters are granted, the curator shall not have authority to exercise any power belonging to the holder of the certificate or to the executor or administrator (sec. 197, cl. 1).

197. (1) Where a certificate has been granted under Part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

Prohibition of exercise of certain powers by curators.

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

Payment of debts, etc., to curator.

[This is sec. 93 of the Succession Certificate Act VII of 1889.]

The grant of probate to an executor or letters of administration to an administrator or the grant of succession certificate is not a bar to the appointment of a curator under this Part of the Act. But this section limits the power of a

(i) *Bhagwandas v. Ananda Chandur*, 1 Taylor 154; *Laami Chand v. Ramlal*, A. I. R. (1931) A. 423. (ii) *Harihar v. Harendra*, 37 Cal. 754. (j) 20 Bom. 437.

curator where probate of a will or letters of administration or a certificate has been granted. In order that there may not be any conflict in the exercise of the respective powers by an executor or administrator and a curator this section enacts that the curator shall not exercise any authority legally belonging to the succession certificate holder or to the executor or administrator. In such a case the debt mentioned in the certificate is to be collected by the grantee of the certificate and not by the curator. In this connection it may be stated that the curator can collect debts without taking out a succession certificate(k).

Sub-Sec. (2). This sub-section provides for an indemnity to the person paying debts or rents to a curator. It provides that payment made to a curator is a good discharge.

198. (1) The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the moveable property, and on the annual profits of the immoveable property, as the District Judge thinks reasonable.

(2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator; but no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office.

[This is sec. 7 of the Succession (Property Protection) Act XIX of 1841.]

Just as an administrator is required to sign an administration bond a curator is required to sign a bond of personal security. A justifying surety may be required if the District Judge so thinks it necessary.

Remuneration.—Five per cent on the value of moveable property taken possession and five per cent on the net rent of immoveable property.

199. (1) Where the estate of the deceased person consists wholly or in part of land paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same:

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report.

(2) The Judge shall not be obliged to act in conformity with any such report, but, in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.

[*This is sec. 8 of the Succession (Property Protection) Act XIX of 1841.*]

Report of Collector.—In cases of agricultural and other land paying revenue to Government this section requires that the District Judge, before issuing the summons and appointing a curator must, except in cases of urgency, call for a report from the Collector in whose district the land is situate. Sub-section (2) provides that if the District Judge does not wish to proceed in accordance with the report then he must immediately send a statement of his reasons to the High Court why he does not want to act in conformity with the report. If the High Court is satisfied with the reasons the appointment will be good. If the High Court is dissatisfied with the reasons then it shall direct the District Judge to proceed in conformity with the report.

200. The curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate :

Institution and
defence of suits.

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents ; but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

[*This is sec. 9 of the Succession (Property Protection) Act XIX of 1841.*]

A curator is an officer of the Court and shall be subject to all orders of the District Judge. If any suit is to be instituted by the curator he must do so after obtaining the leave of the Court. If any person wants to bring a suit against the curator he must also apply to the District Judge who appointed him for leave to institute the suit against the curator. The suit should be instituted or defended in the name of the curator. It is not necessary that the Curator must be specifically authorised by the District Judge to institute or defend the suit(l).

The Proviso to the section requires that if a curator is appointed to collect debts or rents of property, the order appointing him curator must confer express authority to give discharge for the moneys received. The proviso does not relate to the institution or defence of suits but to the Collection of debts and rents. It is not necessary for the curator to obtain a succession certificate before instituting a suit to recover the debt(m).

201. Pending the custody of the property by the curator, the District Judge may make such allowances to apparent owners pending custody by curator. parties having a *prima facie* right thereto as upon a summary investigation of the rights and circum-

(l) *Lakshmi Chand v. Ram Lal*, A. I. R. (1931) A. 423.

Benode Behary v. Rai Sundari, 30 C. W. N. 500; 94 I. C. 588.

(m) *Babasaheb v. Narappa*, 20 Bom. 437;

stances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

[*This Sec. 10 of the Succession (Property Protection) Act XIX of 1841.*]

This section enables the District Judge to make interim order for payment of allowances to parties pending the custody of the property by the curator until the rights of the parties are finally determined on such terms as to security or otherwise as the circumstances of the case permit.

202. The curator shall file monthly accounts in abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and, upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

Account to be
filed by curator.

[*This is sec. 11 of the Succession (Property Protection) Act XIX of 1841.*]

Filing Accounts.—Like receiver the curator is required to file accounts with the District Judge showing the receipts and payments of his administration. Interim accounts are to be filed every three months and final account on his being required to give up the possession of the property.

203. (1) The accounts of the curator shall be open to the inspection of all parties interested; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

Inspection of ac-
counts and right of
interested party to
keep duplicate.

(2) if it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

[*This is sec. 12 of the Succession (Property Protection) Act XIX of 1841.*]

Parties are entitled to inspect and take copies of the accounts kept by the curator. If there is any objection to the account, the parties are entitled to file their objections to the account when the accounts are filed under sec. 202.

Sub-section (2) empowers the District Judge to punish the curator for any wilful default in the accounts or for wilful disobedience to file the accounts after being required to do so.

204. If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same province from appointing any other curator, but the appointment of a curator in respect of a portion of the property

Bar to appoint-
ment of second
curator for same
property.

of the deceased shall not preclude the appointment within the same province of another curator in respect of the residue or any portion thereof :

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge :

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property.

[*This is sec. 13 of the Succession (Property Protection) Act XIX of 1841.*]

If a curator is appointed of the whole property of a deceased person, it shall be a bar to the appointment of a second curator for the same property.

If a curator is appointed of a *part* of the property of the deceased, a second curator may be appointed of the remaining property. If two or more curators are appointed by the Judges of different District Courts, the last proviso empowers the High Court for the efficient administration of the whole property to appoint one curator. It is the High Court alone that has jurisdiction to do so. The District Judge of one District Court cannot in such cases appoint one curator for the whole property.

205. An application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

Limitation . of
time for application
for curator.

[*This is sec. 14 of the Succession (Property Protection) Act XIX of 1841.*]

Limitation.—This section lays down a special period of limitation for application under this Part. The period is six months from the death of the owner of the property. The expression “by right in succession” is chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is, who should be put in possession of the property in succession to the last deceased holder(n).

206. Nothing in this Part shall be deemed to authorise the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

Bar to enforce-
ment of Part
against public set-
tlement or legal
directions by de-
ceased.

[*This is sec. 15 of the Succession (Property Protection) Act XIX of 1841.*]

This section lays down a bar to the appointment of a curator in the following two cases :—

(a) Where there is a public act of settlement made by the deceased proprietor of his property.

(b) Where any legal directions are given in respect of the possession of such property after his death in cases of minority or otherwise of the person entitled thereto.

The District Judge must be satisfied of the existence of such directions.

207. Nothing in this Part shall be deemed to authorise any disturbance of the possession of a Court of Wards of any property ; and in case a minor, or other disqualified person whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid ; and if the minor or other disqualified person, upon the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the Court of Wards.

Court of Wards to be made curator in case of minors having property subject to its jurisdiction.

[This is sec. 16 of the Succession (Property Protection) Act XIX of 1841.]

The District Judge if he decides on inquiry to issue a summons in respect of property which is in the possession of a Court of Wards and if he determines to appoint a curator in respect of such property, then no one else should be appointed a curator, but the Judge should invest the Court of Wards with the curatorship of the estate. No security shall be required in such case.

208. Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.

Saving of right to bring suit.

[This is sec. 17 of the Succession (Property Protection) Act XIX of 1841.]

This section saves the right of the aggrieved party to bring a suit if that party's rights are affected and where he has been evicted from his possession. Such a suit may be brought within 12 years from the date of the cause of action and not one year(o), (See clause 12, Sec. I, Act XIV, 1859).

209. The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession ; but for this purpose it shall be final, and shall not be subject to any appeal or review.

Effect of decision of summary proceeding.

[This is sec. 18 of the Succession (Property Protection) Act XIX of 1841.]

This section bars any appeal or review of the decision of the District Judge in summary proceedings. But if the District Judge's decision is based on material irregularity or if the Judge has acted illegally, it may form the subject of a revision in a proper case(p). In *Bhimappa v. Khanappa*(q) the Court declined to interfere. But in *Bua Ditta v. Sahib Dyal*(r) the Court interfered in revision under the particular facts of the case. In *Gajadhar v. Megha*(s) where the District Judge dismissed an application for appointment of a curator on account of delay it was held that the order of dismissal was not appealable.

210. The Provincial Government may appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him under this Part.

[This is sec. 19 of the Succession (Property Protection) Act XIX of 1841.]

(p) *Abdul Rahiman v. Kati Ahmed*, 10 Mad. 68; *Sato Koer v. Gopal*, 34 Cal. 929; *Krishnasami v. Muthukrishna*, 24 Mad. 364; *Sakharam v. Vinayak*, A. I. R. (1927) N. 253.
 (q) 34 Bom. 115.
 (r) 20 Lah. 196.
 (s) 44 All. 546.

PART VIII.

Representative title to property of deceased on succession.

[The words "on succession" in the heading are newly added (see the Report of the Joint Committee)].

211. (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Character and property of executor or administrator as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

[Clause (1) is sec. 179 of the Succession Act X of 1865. Clause (2) is sec. 4 of the Probate and Administration Act V of 1881.]

Upon the death of a person all his property devolves upon his legal representatives that is to say upon the executor, if the person has died leaving a will and appointing executor; or upon the administrator if the person has died intestate. Notwithstanding the testamentary disposition of the estate the property devolves on the legal representative for the purpose of administration of the testator's estate. The expression "legal representative" is not defined in this Act but has been defined in the Code of Civil Procedure, sec. 2 (11). An heir of a Parsi is not his legal representative(t). The definition of the words "executor" and "administrator" is given under sec. 2(c) and 2(a).

Difference between Executor and Administrator.—(1) An administrator can only be appointed by a competent Court. An executor can only be appointed by a will or codicil.

(2) An executor derives his title from the will and all the property of the testator vests in him from the date of the testator's death. Sec. 213 only means that no Court shall recognise the right of an executor unless he has obtained probate of the will under which he claims. But the effect of this section is that the estate vests in the executor by virtue of the will and from the date of the death of the testator(u). An administrator derives his title from the letters of administration and the property of the deceased does not vest him until the grant. But in order to prevent injury being done to the estate of the deceased the legislature has adopted the doctrine of relation back that upon the grant being made the title of the administrator relates back to the time of the death of the intestate. (See sec. 220).

(3) Executor of a will capable of obtaining probate is a legal representative capable of instituting a suit from the date of the testator's death within the meaning of sec. 17 of the Limitation Act and therefore time begins to run from the date of the testator's death and not from the date of the grant of probate (v). See also sec. 9 of the Limitation Act which provides that when letters of administration to the estate of a creditor have been granted to his debtor, the running of time prescribed for a suit to recover the debt shall be suspended while the administrator

(t) *Framji v. Adarji*, 18 Bom. 337; *Khodadad v. Bai Jerbai*, (1938) Bom. 64 at 72.

(1942) Pat. 120.

(u) *Bhudeh Chandra v. Bhikshakar*, A. I. R.

(v) *Megappa v. Supramanian*, 43 I. A. 113.

continues. An administrator is not a legal representative until the grant of letters of administration is made(w).

(4) An executor can give a valid discharge and do all acts for administration of the estate before the grant of probate. An administrator may not do so. An act of an administrator to the prejudice of the estate done before the grant of letters of administration is not made good by the subsequent grant of administration (sec. 221).

The office of an executor or administrator is not assignable; nor does it survive after the death of a sole executor or administrator in favour of his heirs(x).

An executor of an executor is not a derivative executor of the original testator(y). (See further commentary on this subject under sec. 226).

Acceptance and Refusal of the Office of Executor.—The most obvious method of accepting the office is for the executor to apply for probate. But if the executor, without any application for probate does such acts with reference to the estate of the testator so as to amount to intermeddling with the estate that will amount to acceptance of office.

A person appointed executor who does not wish to act may renounce the office. (For further commentary see sec. 239).

Sub-Sec (1).

Vesting of Property in Executor or Administrator.

When probate is granted to one or two or more persons whether or not power is reserved to the other or others to prove, all the powers conferred on the executors may be exercised by the proving executor or executors and shall be effectual as if all persons named as executors had concurred therein, (see sec. 8 of the English Administration of Estates Act, 1925, 15 Geo. 5 ch. 23); the same law is laid down in sec. 311(z). Sec. 20 of the same Statute further lays down that where an infant is appointed executor it shall not operate as a transfer of any interest in the property of the deceased to the infant or to constitute him a personal representative for any purpose unless and until probate is granted to him after he has attained full age. There is no such provision under this Act.

• **What property vests in Executor or Administrator:**—This section puts an executor in India on the same footing as an executor in England(a). The property vests in the executor on his acceptance of office. In the absence of such acceptance the property does not vest(b).

(1) Except as provided by sub-sec. 2 all the property both moveable and immoveable and whether in possession or in interest and all rights of action vest in the executor for the purpose of administration, notwithstanding the testamentary disposition of the testator, including the property over which the deceased had a general power of appointment. The property bequeathed by the testator vests in the legatee only when the consent of the executor under sec. 332 is given. The title of the legal representative of the deceased is paramount to the title of the beneficiaries under the will or of the heirs-at-law(c). (See Halsbury, Laws of England, Vol. 34, p. 102, sec. 1, title). It is only the legal estate that vests in the

(w) *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.); *Miyappa v. Supramania*, 18 Bom. L. R. 642 at 649.

(x) *Sachindra v. Bepin Behari*, 35 C. W. N. 1028.

(y) *De Souza v. Secretary of State*, 4 Cal. 1.

(z) *Satya Prashad v. Motilal*, 27 Cal. 688.

(a) *Jehangir v. Bai Kukibai*, 27 Bom. 281.

(b) *Raja Parthasarathy v. Raja Venkatadri*, 46 Mad. 190.

(c) *Miyappa v. Subramanian*, 43 I. A. 113; *Dwarkanadas v. Dwarkanadas*, 40 Bom. 341; *Soona Mayna v. Soona Navena*, 20 C. W. N. 833 (P. C.).

executor or in the administrator. The vesting is not of the beneficial interest(d). The words "as such" used in the section indicate that the executor or administrator is not the absolute owner of the property in the sense of being the beneficial owner thereof. The property only vests for the purpose of representation and administration(e). As the executor derives his title from the will, immediately on the death of the testator, on the executor accepting the office of executor, all property of the deceased vests in him. In the case of an administrator the property of the deceased vests in him on the grant being made and under sec. 220 it relates back to the date of the death of the deceased and the property of the intestate becomes vested in the administrator from the death of the testator.

In the case of a will not only the properties specified therein but other properties not so specified and not validly disposed of vest in the executor. This right of executor extends to all the properties whether situate in British India or outside and whether held by him for his own benefit or for the benefit of others(f).

(2) **Choses in Action.**—All choses in action also vest in the executor or administrator. A patent is a chose in action. On the death of the patentee it vests in the executors or administrators of the deceased patentee(g), (see sec. 43(1) of the Patent and Designs Act). But where the patent is granted to two or more persons, sec. 37 of the Patent and Designs Act creates a joint tenancy and the survivor takes the patent. In the case of an unpatented invention application for patent may be made by executors or administrators. (Halsbury's Laws of England, Vol. 14, p. 303.)

(3) **All shares and securities** held by the deceased vest in the executors or administrators. In *Scott v. Frank F. Scott*(h), a question arose whether an executor was entitled to have his name entered in the register of shareholders and it was held that in the absence of any power of veto conferred on the company by its articles of association, he was entitled.

(4) **Policy of Insurance.**—In the case of moneys due under the policy of insurance it is the executor or administrator who becomes entitled to the same unless the policy is declared to be for the benefit of the wife under sec. 6 of the Married Women's Property Act. In such a case if the wife dies in the lifetime of the husband, her legal representatives and not the husband's legal representatives become entitled(i).

If the assured commits suicide personal representative has no right to recover the moneys(j). But see contra, *Northern India Insurance Co. v. Kanayalal*(k). But the decision is doubted. (See Companies Cases 1940 at p. 23.)

(5) **Leasehold Property.**—If the testator died possessed of leasehold, the property also vests in the executor and it is not a breach of covenant not to assign without the consent of the lessor if by the will the testator bequeaths the leasehold property to his son, and the executor transfers the property to the son(l).

(6) **Causes of Action.**—All causes of action which survive the deceased under sec. 306 also vest in the executors or administrators.

(7) **Copy Right.**—Copy right in unpublished as well as published works

(d) *Lalooibhai v. Mancooverbai*, 2 Bom. 338.

(e) *Kulwanta Bewa v. Karamchand*, (1939) 1 Cal. 21; A. I. R. (1938) C. 714.

(f) *Midnapore Zamindary Co. Ltd. v. Ram Konai*, 5 Pat. 80.

(g) *Etwood v. Christy*, (1861) 17 C. B. N. S. 754.

(h) (1940) 1 Ch. 794.

(i) *Cousins v. Sun Life Co.*, (1932) W. N. 198 (reversed at p. 239).

(j) *Beresford v. Royal Ins. Co.*, (1939) Comp. Cases. p. 1.

(k) 1938 Com. Cas. Ins. p. 1.

(l) *Jagardene v. Jagardene*, A. I. R. (1939) P. C. 188; 182 I. C. 770.

on death vests in the executors or administrators. (See Indian Copy Right Act III of 1914 secs. 5 & 17).

Time and Duration of Vesting.—In the case of an executor the property vests from the date of the testator's death (see sec. 227), and remains vested so long as the executor continues to fill the character of an executor during the course of the administration of the estate. But if the estate is once wound up an executor cannot give title to the property(*m*). But if the executor is also a beneficiary under the will, the purchaser can acquire a good title(*n*).

The position of an administrator is the same with this difference that he acquires an interest after the administration is granted to him ; but on such grant the vesting relates back to the date of the death of the testator (see sec. 220).

Interest in the Property Vested in Executor or Administrator.—The words "as such" in sub-section (1) indicate that an executor or administrator is not the absolute owner of the property of the deceased in the sense of being the beneficial owner thereof, but the property only vests for the purpose of representation(*o*). He holds the property in *autre droit*, viz., as the minister or dispenser of the property of the deceased(*p*). "An executor has the property only under a trust to apply it for payment of the testator's debts and such other purposes as he ought to fulfil in the course of his office as executor" (*q*). If, therefore, an executor or administrator becomes insolvent, if the property of which he is the executor or administrator is not mixed up with his own property, it will not be liable to distribution among his creditors, nor can the goods of a testator in the hands of his executor be seized in execution of a judgment against the executor in his own right. (Williams on Executors, 12th Edn., p. 418).

Beneficial Interest.—Merely because an estate is in the hands of an administrator, the beneficiaries are not incompetent to deal with their beneficial interest in the estate. The words "as such" used in this sec. show that the vesting is not of the beneficial interest but only for the purpose of representation. An executor has no beneficial interest in the property of the deceased(*r*). In the case of intestacy the beneficial interest vests in the heir-at-law and there is nothing in the Act which limits the power of disposal of the heir over such estate merely because the grant of administration is made(*s*). But such alienation by the heir-at-law is subject to the paramount right of the executor or administrator. (Halsbury, Vol. 34, p. 102). In the case of a legatee under the will, the property will vest in the legatee only on the assent of the executor being given under sec. 332. In the case of an administrator, merely because the estate is in his hands, the beneficiaries are not incompetent to deal with their interests in the estate. A mere direction to sell or a devise that the land shall be sold by the executors gives merely the power but a devise to the executors in trust for sale passes the legal estate and the beneficiaries take an equitable interest(*t*).

Sub-sec. (2)

Property which does not vest in the Executor or Administrator.—This sub-section is the reproduction of sec. 4 of the Probate and Administration Act. This section prevents vesting of only one class of property, viz., property which passes by survivorship in the case of Hindus, Muhammadans, etc. But there are

(*m*) *Vertannes v. Robinson*, 29 Bom. L. R. 1017.

(*n*) *Bijraj Nopani v. Pura Sundari*, 16 Bom. L. R. 796 (P. C.).

(*o*) *Kulwanta Bewa v. Karamchand*, (1939) 1 Cal. 21; A. I. R. (1938) C. 714; 43 C. W. N. 4.

(*p*) *Pinchon's Case*, 8 Co. 88, b, 9 Co. 89, a.

(*q*) *Farr v. Newman*, 4 T. R. 621, at 645.

(*r*) *Lalubhai v. Mankucerbai*, 2 Bom. 388.

(*s*) *Kulwanta Bewa v. Karamchand*, (1939) 1 Cal. 21.

(*t*) *Elizabeth v. Bhupendra Nath*, 7 Pat. 520 at p. 544.

other classes of property which also do not vest in the executor or administrator. The following properties do not vest in the executor :—

(a) **Joint Family on Ancestral Property.**—By Hindu law the joint family or ancestral property passes by survivorship. On the death of a coparcener his share goes to the surviving coparceners. Even if he makes a will in respect of his share in the coparcening property and appoints executors, the will has no effect and is null and void(*u*). Even if probate is granted to the executor in respect of joint family property, the property does not vest in such executor and the persons to whom the coparcenary property passed by survivorship have the right for representation under secs. 255 and 256(*v*). If letters of administration are granted in respect of ancestral property, the same are ineffectual and no title to the property will vest in the administration(*w*).

(b) **Partnership property.**—By virtue of the provisions of the Indian Partnership Act, on the death of one partner, the partnership property vests in the surviving partners.

(c) **Property held in Joint Tenancy.**—If A and B hold property as joint tenants, then on the death of A the entire property vests in B.

(d) **Trust Property.**—Property held by the deceased in trust as executor or administrator. In India the executor of an executor is not a derivative executor of the original testator(*x*).

(e) Property held by the deceased as a trustee or over which the testator has no disposing power do not vest in his executor.

Character and vesting of property in cases of Wills of Hindus in the executor or Administrator.

(a) **Indian Succession Act X of 1865.**—Sec. 179 of that Act which corresponds to clause (1) of the present section did not apply to Hindus. The appointment of an executor by a Hindu in a will executed before the Hindu Wills Act did not vest the property in him. He held the property only as a manager(*y*). Their Lordships of the Privy Council in *Administrator-General v. Premlal*(*z*) held that the rights of Hindu executors prior to the passing of the Administrator-General's Act of 1867 were "not those of an English executor but rather those of a manager ; he did not require probate and probate if obtained would not have vested him with any title to the estate real or personal which he administered"(*a*). Probate conferred on him no right of property analogous to that of an English executor. His dealings with the property of the testator were governed by the provisions of the will(*b*). Beyond that he had the bare power of a manager. The word "vest" is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act(*c*).

(b) **Hindu Wills Act XXI of 1870.**—This Act applied to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist on and after the first day of September 1870 *within* the territories subject to the Lieutenant Governor of Bengal, and in the towns of Madras and Bombay, and to all wills and codicils *outside* those

(u) *Harilal v. Bai Mani*, 29 Bom. 35.

(v) *Ujambai v. Harakchand*, 59 Bom. 644.

(w) *Kulwanta Bewa v. Karamchand*, (1939) 1 Cal. 21.

(x) *De Souza v. Secretary of State*, 12 B. L. R. 428.

(y) *Basanta Kumar v. Ramshankar*, 59 Cal. 859.

(z) 28 Cal. 788, 22 I. A. 10.

(a) See also *Grish Chunder v. Broughton*, 14 Cal. 861; *Sarat Chandra v. Bhupendra Nath*, 25 Cal. 103; *Sadhir v. Gobinda*, 45 Cal. 538.

(b) *Jugmohandas v. Pallonjee*, 22 Bom. 1.

(c) *Khrodemoney v. Doorgamoney*, 4 Cal. 455 at p. 458; *Maniklal v. Manchershhi*, 1 Bom. 269; *Lallubhai v. Mankwarbai*, 2 Bom. 384.

territories and limits so far as they related to *immoveable* property within those territories or limits.

By sec. 2 of the said Act as originally enacted the following sections of the Indian Succession Act, 1865, were applied to all such wills, *viz.*, 46, 48, 49, 50, 51, 55, 57 to 77 (both inclusive), 82, 83, 85, 88 to 103 (both inclusive), 106 to 177 (both inclusive), 179 to 189 (both inclusive), 191 to 199 (both inclusive) so much of Parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed and Parts XXXIII to XL (both inclusive) so far as they relate to an executor and an administrator with the will annexed. It will be seen that both the sections 179 and 187 of the Act of 1865 (sections 211 and 213 of the present Act) were applied to all such wills and codicils. It was accordingly observed by their Lordships of the Privy Council in *Administrator-General of Bengal v. Premal* that the "immediate effect of the Act of 1870 was to place a Hindu executor who chose to take advantage of its provisions on precisely the same footing as the executor of an Anglo-Indian testator in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. When the Probate and Administration Act was passed, sec. 154 of the Act amended the Hindu Wills Act and all the sections and Parts of the Indian Succession Act, 1865, commencing with 179 were omitted and section 187 substituted. Section 179 was omitted as it was reproduced in section 4 of the same Act and section 187 was retained in the Hindu Wills Act as it was not incorporated in the Probate and Administration Act. The effect of these enactments was the same as stated above, *viz.*, that in respect of all the wills coming within the Hindu Wills Act all the property of the deceased vested in the executor from the time of the death of the testator and probate of such wills was compulsory. The vesting took place on the taking of probate but related back to the time of the testator's death(d).

(c) **Administrator General's Act III of 1913.**—This Act repealed the Administrator General's Act II of 1874. Sec. 25 of the Act enacted that any private executor or administrator may, with the previous consent of the Administrator General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing transfer all estates, effects and interests vested in him to the Administrator General. It would seem from the observations of their Lordships of the Privy Council in *Administrator-General v. Premal Mullick*(e), that the executor of a Hindu will governed by the Hindu Wills Act could only take advantage of this section if he had obtained probate.

(d) **Probate and Administration Act VI of 1881.**—This Act applied to the whole of British India. The preamble to the Act stated that the Act was enacted to provide for the grant of probate and letters of administration to the estate of a deceased person to whom the Indian Succession Act did not apply. The Act, therefore, applied to Hindus, Mahomedans, Buddhists and exempted persons under sec. 332 of the Indian Succession Act, 1865 who died before or after 1st April 1881. First part of sec. 4 of that Act corresponds to clause 1 of the present section. It enacts that the executor or administrator of a deceased person is his legal representative and all the property of the deceased vests in him as such. Second part of that section corresponds to clause (2) of the present section. But section 187 of the Indian Succession Act, 1865 (sec. 213 of the present Act) is not incorporated in the Probate and Administration Act. Hence it follows that no probate of a will or codicil and no letters of administration are essential or compulsory under that Act(f), although probate or letters of administration may be granted

(d) *Gopal v. Amulya Kumar*, 59 Cal. 911; (e) 22 Cal. 788.

Prabhatnath v. Ramendra Kumar, 61 Cal. (f) *Venkata v. Ramayya*, 59 I. A. 112; 54 Mad. 443.

under that Act. No obligation is cast on a Hindu or a Mahomedan executor of wills not coming under the Hindu Wills Act to take out probate. Probate was regarded only as one mode of proving a will. It may be stated that when the Probate and Administration Bill was introduced in Council, a provision was inserted making the production of probate or letters of administration necessary in all cases where the property exceeded Rs. 1,000 but that provision was deleted in the Select Committee. The Act is purely permissive so far as the necessity for taking out probate is concerned.

There is a conflict of decisions as regards vesting of the estate in case where no probate was obtained of the will of a Hindu under the Probate and Administration Act. The Bombay High Court in *Mathuradas v. Goculdas(g)* has held that an executor who does not take out probate had the power of alienation which the English law confers on executors and in *Narandas v. Narandas(h)*, it was held that the estate of a deceased vested in the executor even though he did not obtain probate and the same view was taken in *Sir Mahomed Yusuf v. Hargovandas(i)*.

The Madras High Court agrees with the Bombay view and in *Ganapathi v. Sivamalai(j)* it has held that an executor under the Probate and Administration Act, unlike an executor under the Indian Succession Act or the Hindu Wills Act can clothe his vendee with the full title even without obtaining probate or letters of administration. The subject again came up for consideration in *Ramiah v. Venkata(k)* and the following question was referred to the Full Bench "Whether an executor appointed by a Hindu will made in the Mofussil has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act, even though such an executor does not obtain probate of the will or whether his powers, unless he obtains probate, are only those of a mere manager and the Full Bench held that the estate vests in the executor who accepts office from the date of the testator's death, even though probate has not been obtained. This case went up to the Privy Council and the Full Bench decision was confirmed. Their Lordships held that there was nothing to suggest that the vesting under sec. 4 or the power of disposal under sec. 90 is dependent upon the grant of probate. In *Sivasankara v. Amaravathi(l)*, where the executors appointed under the will of a Hindu in respect of which probate was not necessary declined to accept office it was held that the estate vested in the heirs of the deceased. The Allahabad High Court has taken the same view(m). The Court has held in that case that an executor represents the estate even before the probate is taken out; that the probate establishes the will from the date of the death of the testator and is conclusive proof of the appointment of executor.

A different view has been taken by the Calcutta High Court(n). It held that an executor under a Hindu will to which the Hindu Wills Act did not apply was not in the same position as an English executor and the property did not vest in him unless he applied for probate. He was only a manager. In *Sakina Bibee v. Mahomed(o)* the same status of a manager was reiterated by Pugh, J., although that remark was *obiter*. In view of the Privy Council decision quoted above, it is submitted, these decisions must be deemed to be overruled. The conclusion is that in case of a Hindu to which the Hindu Wills Act does not apply the estate of the testator vests in the executor if he accepts office from the date of the testator's death, even though probate has not been obtained. The latest view adopted by the

(g) 10 Bom. 468.

(h) 31 Bom. 408; 9 Bom. L. R. 287.

(i) 47 Bom. 231.

(j) 36 Mad. 575.

(k) 49 Mad. 261 (in appeal to P. C.) 55 Mad. 443; 59 I. A. 112.

(l) (1938) Mad. 334.

(m) *Meghraj v. Krishna*, 46 All. 286.(n) *Surat Chandra v. Bhupendra Nath*, 52 Cal. 103.

(o) 37 Cal. 889.

Calcutta High Court is that in respect of wills made after 1870 on the executor obtaining probate they immediately became vested with the whole estate, in other words the vesting takes place on the taking of probate but relates back to the testator's death(p).

(e) **Present Act.**—This Act repeals the Hindu Wills Act and the Probate and Administration Act. But this being a consolidated Act the sections are reproduced. Sec. 2 of the Hindu Wills Act is reproduced in sec. 57 and Schedule III and in section 213 clause (2). Section 4 of the Probate and Administration Act is sec. 211 of this Act. The effect of the incorporation of these sections is the same as pointed out above. The property of the testator vests in the executor.

Character and Property of the Executor of the Will of a Mahomedan.—

Under Mahomedan law an executor of the will of a Mahomedan took no title to the property of the testator. His position was that of a manager. Under Mahomedan law a Mahomedan cannot dispose of by will more than one-third of his property, and the remaining two-thirds go to his heirs. Before the Probate and Administration Act which was for the first time applied to the Mahomedans an executor of the will of a Mahomedan who had obtained probate was a bare trustee for the heirs as to two-thirds of the estate when realized and an active trustee as to the one-third. In *Kurratulain v. Peara Saheb*(q) Sir Arthur Wilson in delivering the judgment of the Privy Council observed, "From an earlier date the Supreme Courts granted probates of Hindu and Mahomedan wills. The practice varied greatly from time to time and it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was, however, established that such probate might issue. But the Supreme Court never applied the English rule as to the necessity of probate to Hindu or Mahomedan wills, nor did they attribute to such probate when granted the English doctrines as to the operation of probate. Under that system a Hindu or Mahomedan took no title to the property merely as such by virtue of the probate. In the case of Mahomedan executors such a title was created for the first time by the Probate and Administration Act." In *Fatma v. Essa*(r) it is observed that the view taken by West, J., that an executor of a will of a Mahomedan cannot claim to represent the estate of his testator until he has taken probate is not sound and was not accepted on appeal(s) and the same view is reiterated by the Judicial Committee of the Privy Council(t). In *Sir Mahomed Yusuf v. Hargovandas*(u) the same question came up for consideration and in construing sec. 4 of the Probate and Administration Act the Bombay High Court held that the property of a Mahomedan testator vested in the executor and it could be sold and conveyed by him under sec. 90 of the said Act and no grant of probate was necessary.

When the present Act was enacted the same question was considered by the Bombay High Court(v) and it was held that the effect of sec. 211 was that an executor of the will of a Mahomedan is invested with the legal ownership not only of the one-third of the estate but also of the remaining two-thirds over which the testator had no power of disposal.

The conclusion to be drawn from these authorities is that the executor of the will of a Mahomedan is his *legal representative under sec. 211 and the property vests in him*. Though a Mahomedan cannot dispose of more than one-third of the property by will after the payment of debts and funeral expenses and the two-

(p) *Gopal Lal Chandra v. Amulya Kumar*, 59 Cal. 911.

(q) 32 I. A. 244 (same as *Kurratulain v. Nazbat-ud-Dowla*, 33 Cal. 116), 7 Bom. L. R. 876; 9 C. W. N. 988.

(r) 7 Bom. 266.

(s) *Shah Moosa v. Shah Essa*, 8 Bom. 241.

(t) *Venkata v. Ramayya*, 59 I. A. 112 at p. 117.

(u) 47 Bom. 231; 24 Bom. L. R. 753.

(v) *Azimunnisa v. Ali Khan*, 29 Bom. L. R. 434.

thirds go to his heirs, unless the heirs consent to such disposition, the entire property vests in the executor and he can sell or mortgage the same under sec. 307 without obtaining probate, unless there is a restriction on alienation imposed on the executor by the will(w).

Suit against the heirs of a deceased Mahomedan.—The Calcutta High Court has expressed the view that any creditor of a deceased Mahomedan could sue anyone of the heirs in possession of the whole or any part of the estate, without joining the other heirs and that in that suit he could claim not only the defendant's share of the debt but the entire debt due from the estate(x). The reasoning underlying the Calcutta decision was that the creditor's suit was an administration suit and that one of the heirs of a deceased Mahomedan in possession of his estate could represent the other heirs. That was also the view of the Bombay High Court(y). In *Davalawa v. Bhimaji*(z) upon a review of authorities Ranade, J., came to the conclusion that the heirs of a deceased Mahomedan who were not parties to the suit on a mortgage were bound by the decree for the possession passed in favour of the mortgagee against some of the heirs in possession.

The Madras High Court adopted the above view of the Bombay High Court in the earlier decisions. But in a later Full Bench Case (a) the Court followed the Allahabad High Court(b) in holding that a sale effected to pay off a debt due from his estate by some of the heirs of a deceased Mahomedan who were in possession of the whole or part of the estate was binding on them to the extent of their share only and did not bind the other heirs. The reasoning of that decision proceeds on the ground that under the Mahomedan law each heir inherits a separate and distinct share and that the theory of representation is unknown to the Mahomedan law, or in other words one heir does not represent the other heirs.

The reasoning underlying the decision of the Allahabad High Court that each of the several heirs in possession of the assets is to the extent to which he is in possession a legal representative of a deceased person and no one of them represents the entire estate or estate of the deceased person found favour in the later decisions of the Bombay High Court(c). In *Bhagirthibai v. Roshanbibi* the question was whether a money decree obtained against the estate of a deceased Mahomedan in a suit by a creditor against some of the heirs was binding against the heir who was not a party to the suit in which the creditor's decree was obtained. The Court held that the heir who was not made a party was not bound by the creditor's decree as the other heirs did not represent her interest. The Court stated that the rule of representation derived from Hindu law was not applicable to Mahomedans. The theory put forward that creditor's suit against the heirs in possession should be regarded as an administration suit binding on all the heirs was expressly discarded on the authority of *Jafri Begum v. Amir Muhammad*(d). The *ratio decidendi* from these decisions is that a creditor of a deceased Mahomedan can institute a suit against some of the heirs of the deceased in possession of his property to recover the debt and succeed only to the extent of the share of the debtor's heirs who are parties to the action.

Suit by some of the heirs of a deceased Mahomedan.—A question came for consideration of the Bombay High Court(e) whether some of the heirs of a deceased Mahomedan can file a suit to recover the debt due to the estate of a

(w) *Shemal v. Ahmed Omer*, 33 Bom. L. R. 1056 at p. 1062.

(x) *Muttyjin v. Ahmed Ally*, 8 Cal. 370.

(y) *Khurshelbibi v. Keso Vinayak*, 12 Bom. 101.

(z) 20 Bom. 338.

(a) *Abdul Majeeth v. Krishnamachariar*, 40 Mad. 243 (F. B.).

(b) *Dattu Mal v. Hari Das*, 23 All. 263, *Manni Gir v. Amar Jati*, 58 All. 594.

(c) *Bhagirthibai v. Roshanbi*, 43 Bom. 412; *Lala Miya v. Manubibi*, 47 Bom. 712.

(d) 7 All. 822 (F. B.).

(e) *Virbhadrappa v. Shekabi*, 41 Bom. L. R. 249; (1939) Bom. 232, A. I. R. (1939) B. 238.

deceased Mahomedan and it was held that such a suit was defective. Such a suit essentially must be on behalf of entire body of heirs and must conform to the requirements of the law. Some only of the several heirs of a deceased Mahomedan cannot enforce a debt without the concurrence of the rest so as to give a valid discharge to the debtor. In that case the plaint was allowed to be amended and the remaining heirs were made co-respondents in appeal but the Court held that even the fact that all the heirs were represented in the appeal that did not solve the initial difficulty due to the want of certificate of representation as required by sec. 214. It was, however, observed that merely because a suit was instituted without a certificate it did not debar the plaintiffs from producing the certificate before the decree was passed and the case was remanded back to the Lower Court for passing a fresh decree for plaintiffs if they produced a certificate of representation to the estate of the deceased within six months.

212. (1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

Right to intestate's property.

(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, or Indian Christian.

[Clause (1) is sec. 190 of the Succession Act X of 1865; Clause (2) is sec. 331 of the Succession Act X of 1865; and sec. 3 of the Native Christian Administration Act VII of 1901].

This section applies to Parsis but not to Native Christians, the words "Indian Christians" being inserted as per sec. 3 of Act VII of 1901. It does not apply to Hindus and Mahomedans.

This section is to be read with sections 213 and 214. This section applies to cases of intestacy. Section 213 applies when there is a will. In cases of intestacy this section enacts that if any person wants to establish that he has a right to any part of the property of the intestate, such right cannot be established unless letters of administration are *first* taken out to the estate of the intestate. The word "first" occurs in this section but not in section 213 and the insertion of that word would indicate that letters of administration must be obtained before filing any suit for establishing such a right, and not after the filing of the suit as in the case of a grant of probate under section 213. Section 214 applies in the case of recovery of any *debt* due to the estate of the deceased and prohibits the Courts from passing a decree or executing a decree in respect of such debt unless probate or letters of administration or a succession certificate are produced.

The principle underlying this section is that in the case of a person governed by this Act as letters of administration are compulsory, the estate of the intestate is unrepresented without the grant and the decree that would be passed against defendants would be a nullity. This section does not say that the *plaintiff* must obtain letters of administration, it is enough if letters are granted to any one entitled to the grant. Even the Administrator-General cannot sue before he has obtained the letters of administration. Even if the plaintiff in his plaint states that he has applied for but not obtained letters of administration; the suit will be dismissed(f). The section is limited to a suit in which a person seeks to establish a right to any part of the property of the intestate(g). It would, therefore, apply when a person seeks to recover a specified part of the property of the intestate or

(f) *Administrator-General v. Lalit*, 12 C. W. (g) *Tuljaram v. Bamanji*, 19 Bom. 828. N. 738.

a suit by an heir for payment of his share in the property of the intestate(*h*). The section does not apply to the creditors of the deceased intestate to recover the debt due to him from the estate of the deceased. In the above case of *Ratanbai v. Narayandas* the mortgagee sued the widow and sons and daughters of a Parsi intestate and a preliminary mortgage decree was passed. On appeal the defendants contended that the suit was bad and that the decree was a nullity as no letters of administration had been obtained and the estate was unrepresented, but that contention was not upheld. It was held that this section did not apply. The section would apply if one of the mortgagees died and the heirs of the deceased mortgagee filed a suit for sale of the mortgaged property. Such a case falls within sec. 212 and representation must be obtained to the estate of the deceased mortgagee(*i*).

The letters of administration required by this section are the grant of general letters of administration to the whole estate and not a limited grant of administration to any particular portion of the estate(*j*). If no representation to the estate of the intestate is taken out the only course open to the plaintiff would be to take proceedings to have an administrator appointed before filing the suit(*k*).

Filing of Suit by Administrator.

As to whether the suit would be *ab initio* bad if filed before the grant of letters of administration or whether the defect would be cured if the representation is obtained before the passing of the decree the decisions are conflicting. As the word "first" occurs in this section but not in section 213 it would seem that such a suit would be bad *ab initio* as the plaint ought to show that the estate is represented. In *Sethna v. Hemingway*(*l*) the grant was made after the filing of the suit but before the decree was passed. It was held that the plaint was defective and should have been rejected on presentation but as the suit was allowed to be proceeded and a decree was passed, and as the plaintiff had obtained letters of administration before the hearing, it was not contrary to section 190, (section 212). This case was followed in *Yousef v. Islam*(*m*). In *Mayappa v. Subrahmaniam*(*n*) there are observations of their Lordships of the Privy Council that "an administrator derives his title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant."

In England the practice seems to be that at common law an action cannot be commenced by an administrator before the grant to him of the letters of administration as the administrator derives his authority, not like an executor from the will, but from the grant; he has no right of action until he has obtained them(*o*). In Chancery, however, the practice was not so strict and a bill could be filed before the plaintiff had taken out letters provided he produced them at the hearing, but the bill had to allege that they were already obtained. This difference of practice seems to remain notwithstanding the Judicature Act, (Williams on Executors, 12th Edn., pp. 272-273; Halsbury, Vol. 14, p. 147; Annual Practice (1938) p. 249.) This English practice is followed in India. In *Gordhandas v. Ramcoover*(*p*) it was ordered that the decree should not be drawn up until the plaintiff had obtained letters of administration with the will annexed (see p. 475 of the report). In *Hormasji v. Dhanbai*(*q*) the applicant was added as a party to an originating summons on her undertaking to take out letters of administration prior to the decree being drawn up. Attention may also be drawn to Order 7 rules (4) and

(*h*) *Ratanbai v. Narayandas*, 51 Bom. 771.

(*i*) *Yousef v. Islam*, 33 Bom. L. R. 1222.

(*j*) *Framji v. Adarji*, 18 Bom. 337.

(*k*) *Barnett Brothers v. Mrs. E. Fowle*, 3 Rang. 46.

(*l*) 38 Bom. 618.

(*m*) 33 Bom. L. R. 1222.

(*n*) 43 I. A. 113 at p. 119.

(*o*) *Wankford v. Wankford*, 1 Salk. 301.

(*p*) 26 Bom. 449.

(*q*) 31 Bom. L. R. 511.

3 (2) of the Code of Civil Procedure. The plaint by a person suing in representative character should show not only that the plaintiff has an actual existing interest in the subject matter, but that *he has taken steps necessary to enable him to institute a suit concerning it.* In *Administrator-General v. Lalit*(*r*) this order was considered and the suit was dismissed. It may be noted here that in sec. 50 of the Code of Civil Procedure of 1882 there occurred two illustrations which were as follows :—

(a) A sues as B's executor. The plaint must state that A has proved B's will.

(b) A sues as C's administrator. The plaint must state that A has taken out administration to C's estate.

Both these illustrations have been omitted in the corresponding O. 7 r. 4 of the present Code.

Filing of Suits against Executors or Administrators—Admission of Assets.—Under sec. 52 sub-sec. 1 of the Code of Civil Procedure if a money decree is passed against the legal representative it can only be executed by the attachment and sale of the property of the deceased in the hands of the legal representative. But sub-sec. 2 provides that in so far as the property of the deceased which has come into the hands of the legal representative has not been duly applied by him, the decree may be executed against the legal representative as if the decree was to that extent passed against him personally. The onus to prove misapplication of assets come to the hands of the legal representative lies on the decree holder(s). Under sec. 323 the executor or administrator is bound to pay the creditors of the deceased including himself “equally and rateably” if the assets are insufficient to pay all the creditors in full and if he fails to do so he becomes personally liable to the extent to which he has not done so. To ascertain whether the assets have been duly applied, the Court of execution may direct an inquiry into the accounts of the executor or administrator(*t*). The executor or administrator may show that he is not liable and that he has duly applied the property which has come into his possession. Rt. Hon'ble Sir Dinsha Mulla in his commentary on the Code of Civil Procedure (11th Edn., p. 219) states that “this is called in English law the plea of *plene administravit*” the essential part of which is that “the defendant has no goods which were of A.B. (deceased) at the time of *his death in the hands of the defendant as executor or administrator* to be administered or had at the commencement of the suit or ever since. “Unless the Indian system of administration as laid down in this Act, the decree-holder has another remedy under sec. 361 which enacts that a creditor who has not received payment of his debt may call upon a legatee who has received of his legacy to refund. But this remedy cannot be availed of in execution proceedings and must be exercised by a suit(*u*).

As pointed out by their Lordships of the Privy Council(*v*) the Indian system of recovering debts due from a person deceased is different in important respects from the English system.

English Law.—In Williams on Executors (12th Edn., pp. 1166, 1240) the scheme of the English law and the conditions upon which the judgment could be recovered *de bonis testatoris* or *de bonis propriis* are described. If an executor is sued for the debt due by the testator and had not assets to satisfy the debt he had to take care to plead *plene administravit* or *plene administravit praeter*; otherwise judgment for the plaintiff amounted to a conclusive admission that he had assets to satisfy it. Where this plea was taken the burden was on the plaintiff

(*r*) 12 C. W. N. 738.

(*s*) *Eusoo Karwa v. Mrs. Nimaji*, A. I. R. (1940) R. 603.

(*t*) *Daw Joke v. Maung Ba*, 5 Rang. 44.

(*u*) *Jaychandra v. Satishchandra*, 58 Cal. 170.

(*v*) *Sir Jamshedji Jeejibhoy v. Sorabjee Warden*, 42 Bom. L. R. 719 at p. 729 (in appeal from (1940) Bom. 534).

to show that the assets existed or ought to have existed in the hands of the defendant at the date of the writ, but this burden might be discharged by proof of some conduct of the defendant amounting to admission of assets. In an administration action such admission entitles the plaintiff to an immediate order for payment without taking the accounts. The general rule was that admission of assets to one claimant was an admission to all: also that an admission of assets can never be retracted unless a case of mistake be clearly established. To charge an executor on his own promise to pay the debt of the testator, in addition to the writing required by the Statute of Frauds, it was necessary to show consideration for the promise. This is the English law as to admission of assets.

Indian Law.—The law in India either within or outside the Presidency towns is not the same. The Indian system of recovering debts due from a person deceased is different in important respects. In the first place the legal representative who is liable is not in general an executor or an administrator at all but the Mahomedan heir or the Hindu son or a mere intermeddler with the deceased's estate as is made clear by sec. 2(11) of the Code of Civil Procedure. The form of judgment given for the debt against the legal representative is for the payment out of the property of the deceased. If no such property remains in the hands of the defendant, execution can be had against his own property on proof that the property of the deceased had come into his possession, unless he proves that he has duly applied such property of the deceased. The Court executing the decree will require him to produce the accounts as necessary under secs. 50 and 52 of the Code of Civil Procedure. If the legal representative has wrongly applied part of the assets of the deceased he may be made liable in such proceedings to the creditor: his right being to get credit only for what has been "duly disposed of" or "duly applied". The law of India puts upon a legal representative the full burden of showing that he has duly applied all assets proved to have come to his hands but it has no bias tending to make a legal representative liable to answer with his own property for the debts of the deceased even if it be true that he knows better than the creditor the position of the deceased's estate. As observed by Their Lordships of the Privy Council that the "assets come to his hands" is consideration for a personal promise to pay the debt of the deceased is a doctrine to which it is difficult to give a meaning under the Indian Contract Act but a forbearance to sue is a consideration as to which there is no difficulty provided it is in fact agreed. (See page 783 of the Report).

Sub-Sec. (2).

Hindus.—This section does not apply to Hindus and the Privy Council in *Secretary of State v. Parijat(w)*, held that under an application for direction under sec. 302 by an heir of a Hindu intestate no letters of administration nor succession certificate were necessary.

Mahomedans.—This section does not apply to a Mahomedans and in case of intestacy no letters of administration are necessary.

Indian Christians.—Upto 1901 Indian Christians were governed by the Indian Succession Act, 1865. Native Christians Administration Act VII of 1901 was passed in that year by which sec. 190 (present section 212) was not applied to them. This provision is incorporated in this clause as Act VII of 1901 is repealed.

When Letters of Administration are Necessary.—(1) Letters of administration are necessary in cases of intestacy of Europeans, East Indians, Armenians, Jews and Parsis.

(2) Letters of administration were necessary in the cases of intestacy of Native Christians upto 1901. In that year Native Christians Administration Act VII of 1901 was passed which excluded application of sec. 190 of the Indian Succession Act, 1865, (sec. 212 of the present Act.)

(3) Letters of administration are necessary to recover *debt* under sec. 214, (see further commentary under that section).

When letters of Administration are not Necessary.—(1) Letters of administration are not necessary in cases of intestacy of a Hindu, Muhammadan, Buddhist, Sikh or Jaina, (clause 2).

(2) Letters of administration are not necessary in respect of Math property(x).

(3) Letters of administration are not necessary in cases of intestacy of Indian Christian since 1901.

(4) If a person dies without leaving heir and his estate devolves upon the Crown, letters of administration are not necessary(y).

Joint Hindu Family and Letters of Administration.—

The question whether letters of administration are required in respect of joint Hindu family property when such property stands in the name of the Karta or manager or in the individual name of a coparcener of the joint Hindu family, has given rise to conflicting decisions by the various High Courts. Allied with this question is the question of the payment of probate duty under the Court Fees Act, where also there is a conflict.

The earliest case is *Gurucharya v. Svamirayacharya*,^(z) where it was held that where a member of a joint Hindu family dies, administration cannot be granted under Act XX of 1864 (Minor's Act) nor can the guardian of the person of a minor be appointed. But if the deceased left separate property, administration of such property might be granted. That decision was given before the Probate and Administration Act VI of 1881.

By sec. 2 of the Hindu Wills Act XXI of 1870 (before it was amended by the Probate and Administration Act), sections 179 to 189 and sections 190 to 199 of the Indian Succession Act X of 1865 were made applicable to the wills of Hindus in Bengal and in the towns of Madras and Bombay. (The corresponding sections of the Act of 1925 are secs. 211, 228, 222(1), 222(2), 223 to 226, 213, 227, 236 and secs. 212, 220, 221 229 to 235). The Probate and Administration Act was passed in 1881 (Act VI of 1881) and sec. 154 of that Act amended sec. 2 of the Hindu Wills Act which provided that "for the portion of sec. 2 commencing with the words 'section one hundred and seventy nine' and ending with the words 'administrator with the will annexed' the words 'and section one hundred and eighty seven' shall be substituted". There was also a further amendment of sec. 3 of the Hindu Wills Act. The third clause of sec. 3 of the Hindu Wills Act was, "And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos*". This clause was also repealed by sec. 154 of the Probate and Administration Act. The result of these amendments was that sec. 187 of the Indian Succession Act of 1865 (sec. 213 of the present Act) was the only section substituted in the Hindu Wills Act. This section was not incorporated in the Probate and Administration Act.

(x) *Jib Lal v. Mohunt Jaga*, 16 C. W. N. 796.

226.

(z) 3 Bom. 431.

(y) *Secretary of State v. Girdharilal*, 54 Mad.

This was the state of the law before the present Act XXXIX of 1925 was enacted. Sec. 211, sub-sec. 2 is the reenactment of sec. 4 of the Probate and Administration Act which enacts that when the deceased was a Hindu, etc. "nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person". By sec. 213, sub-sec. (2), sec. 2 of the Hindu Wills Act was reenacted by which it is provided that sub-sec. 1 of sec. 213 shall not apply to the wills of Hindus, etc., except in the case of wills where such wills fall under classes specified in clauses (a) and (b) of sec. 57. Sec. 212, sub-sec. 2 enacts that in cases of intestacy of a Hindu, etc., letters of administration are not necessary. This is the state of law at present. The decisions of the various High Courts are as under :

Bombay High Court Decisions.—In *Bank of Bombay v. Ambalal Sarabhai* (a), decided in the year 1900, the facts of the case are that one Sarabhai who was a member of a joint and undivided Hindu family died leaving shares of the Bombay Bank standing in his name. After his death his son the plaintiff applied to the Bank for the transfer of the shares to his name offering to make a declaration of coparcenary but the bank refused and insisted on letters of administration being produced. The plaintiff, therefore, filed the suit against the bank praying for a declaration that he was entitled to the shares and that the bank be ordered and decreed to transfer the shares to his name. Russell, J., before whom the case was tried held that no letters were necessary but on appeal Jenkins, C. J., reversed the decision and held that the bank was regulated by the Presidency Banks Act (Act II of 1876) sec. 23 of which provided that the bank was not bound to recognise any legal representative of a share holder other than a person who had taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration of the estate of the deceased ; that the Legislature had given effect to what the conduct of the business required when it provided that the bank had only to do with the legal title to the shares and not with the beneficial ownership thereof and with the legal title alone the Court was concerned. The Appeal Court observed that a share was for the purpose of devolution or survivorship to be deemed so far as the bank was concerned the exclusive property of its registered holder and sec. 23 of the Presidency Banks Act applied and the suit was dismissed.

In *Collector of Ahmedabad v. Savchand* (b) a Hindu died leaving two minor sons who were joint with him. Part of his estate consisted of Rs. 5,000 deposited in the Bank of Bombay and another sum of Rs. 5,000 deposited with a commercial company. After his death his two sons applied to the Bank of Bombay and to the Company for payment alleging that they were the members of a joint Hindu family but the bank and the company refused to pay unless letters of administration were obtained. Thereupon on behalf of the sons an application for letters of administration was made in respect of the two sums only and the applicant paid Rs. 207 as probate duty under the Court Fees Act and the letters were granted. Subsequently an application was made for refund of the duty paid on the ground that no probate duty was payable under sec. 19D of the Court Fees Act as the estate in respect of which the letters of administration were granted belonged to the deceased as a member of the joint Hindu family which on his death passed by survivorship to his two sons. The Lower Court allowed the application for refund, but the Collector appealed. Chandavarkar, J., held that on the facts of the case no letters of administration were necessary as the property vested in the sons at once by survivorship but the sons having applied for letters of administration they must be taken to have adopted the case of the bank that the deposit was not the deposit of the joint family but was of the estate of

the deceased and therefore the duty was properly paid. This case, however, was disapproved as regards the refund of duty in *Collector of Kaira v. Chunilal*(c).

In *Ochavram v. Dolatram*(d) the point raised was whether it was the function of the Probate Court to go into the title of the property disposed of by the will of the deceased. In that case an application was made for letters of administration by the petitioner who claimed to be a member of a joint family of which the deceased was stated to be a member. A caveat was lodged against the issue of the letters of administration. The point urged on behalf of the caveator was that as the deceased was at the time of his death a member of a joint family no letters of administration could be granted as he had left no separate property but Jenkins, C. J., held that in Bombay it had repeatedly been held that on application for probate the Court would not enter on a question of title to the property belonging to the testator which he purported to dispose of by his will and the same principle applied in case of letters of administration when the deceased had died intestate. His Lordship observed that the reasons which operated to limit the scope of the inquiry when probate was sought were actually applicable to a petition for letters of administration, that it was the invariable practice on the Original Side of the High Court not to enter into the question whether a deceased's property was joint or separate and he ordered the letters of administration to issue.

In the above mentioned case of *Collector of Kaira v. Chunilal*, a Hindu who was a member of a joint and undivided Hindu family died possessed of shares of certain joint stock companies and of the Bank of Bombay. He left three sons and the sons applied for letters of administration at first in respect of a portion of the shares and later on for the remaining shares and they prayed for exemption from the payment of Court fees. Notice was given to the Government Pleader and the Collector of Ahmedabad intervened to show cause why probate duty should not be paid. It was held, dissenting from the decision given in *Collector of Ahmedabad v. Savchand*, that the property in respect of which Letters of Administration were sought was held in trust by the deceased for the joint family and the property was therefore entitled to exemption from payment of the Court fee. This decision was also given by Jenkins, C. J. His Lordship stated that the attention of the Learned Judges who decided the case in the *Collector of Ahmedabad v. Savchand* was not drawn to the history on this subject and the unbroken practice on the Original Side of the High Court, that he had consulted the Learned Judges who heard that case and they agreed with the view which His Lordship took of the matter.

In *Kashinath Purasram v. Gourav*(e) a Hindu who was a member of a joint and undivided Hindu family died leaving a will whereby he bequeathed all his property to his minor son. The executor applied for probate but contended that the deceased had no beneficial interest in the property and, therefore, it was exempt from the payment of Court fees. Beaman, J., who delivered judgment at first doubted the correctness of the decision in *Collector of Kaira v. Chunilal*, but later on his attention was drawn to the fact (see p. 254 of the Report) that Chunilal's case was the case of an intestacy and not a case of probate, and different considerations applied. He accordingly held that if a Hindu who was a member of a joint and undivided Hindu family made a will in respect of all his property then the executors who applied for probate of that will could not question the title of the testator to dispose of the property by will and therefore they could not claim any exemption upon an allegation utterly inconsistent with the provisions of the will.

(c) 29 Bom. 161.

(d) 28 Bom. 644.

(e) 39 Bom. 245.

Having regard to that state of the law the matter came to be referred to a Full Bench in *Keshavlal v. The Collector of Ahmedabad*(f), where a Hindu who was a member of a joint and undivided Hindu family left two sons. A portion of the joint family property consisted of shares of a joint stock company in respect of which a petition was presented for letters of administration and exemption was claimed on the ground laid down in *Collector of Kaira v. Chunilal*. The Court was invited to reconsider the decision in *Collector of Kaira v. Chunilal* and the question was referred to the Full Bench. Shah, Ag. C. J., after considering the arguments of both sides observed that his view was that sec. 19D of the Court Fees Act was correctly interpreted in *Collector of Kaira v. Chunilal* and that the view taken in that case was correct.

After this Full Bench decision the next case is *Ujambai v. Harakhchand*(g). In that case a petition for letters of administration was presented in respect of joint family property and credits. It was stated in the petition that the deceased had left a will whereby he purported to will away properties both ancestral as well as self-acquired. Kania, J., held that in his opinion the case of a person who obtained property by survivorship was not expressly provided for under the Indian Succession Act of 1925 and by reason of the express words of sec. 211 as the title in the executor or administrator ordinarily appointed under the Indian Succession Act would not cover the property which had passed to a third person by survivorship it was open to the person to whom such property had passed to come to Court and apply for letters of administration with exception as mentioned in secs. 255 to 257 of this Act. His Lordship observed that just as a beneficiary was entitled to come to Court and apply for a limited grant in respect of a trust property under sec. 250 whether there was a will or not, a person to whom the coparcenary property had passed by survivorship had the right to apply for representation under sec. 255 or 256, as the case might be. His Lordship further observed that for the member of the joint Hindu family who had a separate property of his own which would pass under his will to the executor and for the joint family estate, which passed to another person by survivorship, it was not a case of rare occurrence, and his Lordship ordered that letters of administration be issued to Ujambai for the use and benefit of her minor son limited to the period of his minority with the exception of the separate property of the deceased. This case was followed in *Vithaldas v. Wadilal*(h). A petition for letters of administration in respect of joint family property consisting of shares of a joint stock company situate at Ahmedabad was presented and letters of administration were granted. The latest case is *Birdibai v. Chunilal*(i), in which a Hindu widow on her own behalf and as guardian of her minor children applied for letters of administration of her husband's joint family property consisting mainly of shares of joint stock companies and bank deposits and letters were granted without payment of duty.

Calcutta High Court Decisions—There are only three decisions of that Court on these subjects.

In *Re Goods of Pokurmull Augurwallah*(j), the deceased who was a member of a joint Hindu family governed by the Mitakshara law left a will appointing executors. The executors applied for probate but claimed exemption from payment of probate duty on the ground that the property was joint ancestral property which passed by survivorship and the Taxing Master was of opinion that it should be allowed under sec. 19D of the Court Fees Act. But as the question was of general importance the Taxing Master referred the matter for determination to

(f) 48 Bom. 75 (F. B.); 25 Bom. L. R. 1240. (i) 47 Bom. L. R. 862.

(g) 37 Bom. L. R. 300.

(j) 23 Cal. 980.

(h) 38 Bom. L. R. 257.

the Chief Justice and a Bench was formed. The Court held that as the property was purchased by the four brothers who were members of a joint Hindu family governed by the Mitakshara law with moneys belonging to the joint estate, although the property was conveyed to them as tenants-in-common it vested in them as trustees for the benefit of all the coparceners and consequently was not liable to duty.

In *Re Bhubaneswar Trigunait(k)* an application for letters of administration was made by the surviving members of a Mitakshara Hindu joint family regarding the property held by the deceased as a Karta and the grant was made. As regards the duty payable in respect of such grant the petition was accompanied by a certificate of the Taxing Master that *ad valorem* fee was not payable in this case. The exemption was claimed on the ground that the deceased was the sole trustee at the date of the death of the deceased. The matter came up before the Chamber Judge and the Chamber Judge was of opinion that a fee was chargeable and he dismissed the application. Thereupon an appeal was preferred and the Appeal Court ordered notice to be given to the Government Solicitor and he appeared. The Appellate Court decided that the certificate of the Taxing Master that no fee was payable was final under sec. 5 of the Court Fees Act and the learned Judge of the Lower Court had no jurisdiction to review the same. At the end of the judgment it has been pointed out that such questions are likely to arise in future and it is suggested that in view of the difficulties and divergence of opinion disclosed by the decisions of the various Courts and the likelihood that the shares and Government securities and bank deposits belonging to Mitakshara families who come up for consideration, some provision by the Legislature was required to solve the difficulties which would arise in such cases. Sanderson, C. J., agreed with this remark that the matter should be dealt with by the Legislature because of the importance of the matter to the members of joint Mitakshara families and directed that a copy of the judgment be sent to the Government of India. The order made was that letters of administration do issue as prayed for.

In *Durgaprasad v. Jewdhari(l)* two contentions were raised, (a) that no letters of administration could be granted under sec. 211 in respect of an estate of a deceased person who was a member of a joint Mitakshara family and (b) that the mortgage deed was void as no order of the Court was obtained. On the first question Mitter, J., held that no letters of administration could be granted in respect of the estate of a deceased person who was a member of a joint Mitakshara family and if such a grant was made it was not necessary under sec. 263 to have it revoked as the grant was a nullity. It does not appear that the previous decisions of the same Court were brought to the notice of His Lordship on this aspect of the case.

Madras High Court Decisions.—The Madras Court in the Full Bench case of *Desu Manavala Chetty(m)*, considered similar question. In that case the applicant prayed for the grant of letters of administration in respect of property standing in the name of his deceased father but forming the joint ancestral property of the undivided Hindu family and he stated in his petition that the property passed to him by survivorship but he was obliged to take out letters of administration as part of the property consisted of shares in certain companies which in accordance with the Articles of Association refused to recognise the title to the shares unless he obtained such letters and also claimed exemption from payment of Probate Duty on the ground that his father held it as a manager and trustee for the family, and relied on the decision of *Collector of Kaira v. Chumilal*. It was, however, observed that in the Presidency of Madras differing from Bengal it was

(k) 52 Cal. 721.

(l) 62 Cal. 788.

(m) 33 Mad. 93.

held that under the Mitakshara law as administered in that Presidency an alienation by an undivided member of his interest in the joint family property was valid and that being the case it seemed impossible to hold that the property in the case was held by the deceased so far at least as his own share in it was concerned as trust property not beneficially or with general power to confer a beneficial interest in it. It was, therefore, held that the interest of the deceased in the joint family property did not come within the category of "property held in trust not beneficially or with general power to confer a beneficial interest" and the appellant was required to file a valuation of the property and to pay the Court fees.

Regarding this decision it was observed in the Full Bench case of *Keshval v. The Collector of Ahmedabad*, (*supra*), that the view of the Madras Court proceeded on somewhat different lines. Shah, Ag. C. J., observed "I have considered the *ratio decidendi* in the case. But I am unable to hold that the fact that a joint sharer has the power to alienate his share for consideration in this Presidency could alter the character of the property. If a man simply alienates his share for consideration and dies the next day without effecting a partition the purchaser would not get his share as it would cease to exist before it was seized. He cannot make a gift of his undivided share and he cannot dispose of it by will. I am unable to hold that such a limited power of dealing with the property can make any difference in the character of the deceased's title to or possession of the property at the time of his death. With great respect for the learned Judges I am unable to accept the *ratio decidendi* in that case". This case was also dissented from in the *Goods of Balmukund Dube* (*n*). In *Secretary of State v. Girdharilal* (*o*) the same High Court has held that probate duty is not payable if the shares are proved to be the property of the joint family.

Allahabad High Court Decisions.—The Allahabad High Court in *Mathura-prasad v. Durgavati* (*p*) has held that a Succession Certificate cannot be granted in respect of a debt belonging to a joint Hindu family if the applicant was joint with the deceased, and the application was dismissed. The certificate in that case was applied for in respect of money deposited in a bank which refused to part with it without the production of a certificate.

In *In the Goods of Balmukund Dube* an application was made for the grant of letters of administration limited to 17 shares of the Port Canning and Land Improvement Co. Ltd., and five shares of another company standing in the name of the deceased who was a member of a joint and undivided Hindu Family. It was stated in the petition that the deceased had left several other properties about which there was no dispute but as the shares stood in the name of the deceased the companies declined to transfer them without representation as the Articles of Association only recognised the executors or administrators of a deceased share holder having title to the shares. It was held that the two companies could not insist upon the appellant obtaining letters of administration regarding the said shares as the same were the separate property of the deceased, and the application was dismissed. It was observed that "it is not within the legal competence of any company to lay down conditions regulating the grant of letters of administration in contravention of any statutory enactment relating thereto. Where the property belongs to a joint family a person claiming by survivorship is not entitled to a grant of letters of administration to any portion of such property as there is no estate or assets which descended from the deceased. To allow the grant of letters of administration in the case of property which has vested in a joint family by rule of survivorship will be subversive of the scheme and policy underlying the entire Succession Act. Sec. 250 provides for a limited grant in

(*n*) A. I. R. (1930) All. 82.
(*o*) 54 Mad. 226.

(*p*) 36 All. 380.

respect of trust property, but the Karta of a joint family does not hold any property acquired by him in his own name with the joint family funds as the sole and surviving trustee of the said property. Such a notion is entirely repugnant to the constitution of a joint Hindu family which is governed by the Mitakshara law. It is equally impossible to maintain that the joint family property is divisible into a legal estate and an equitable estate or that the legal estate with reference to such property vests in the Karta or that the beneficial estate vests in the members of the joint family or that on the death of the Karta letters of administration may be applied for or obtained with reference to any supposed legal estate in the property. Secs. 217 and 218 are conclusive on this point and the Legislature has maintained the enactments of the old Acts of 1881 and 1865 and the judicial interpretation has been accepted by the Legislature".

In *Banwari Lal v. Maksudan Lal*(^q¹) contrary to the above decision, it was held that a member of a joint and undivided Hindu family gets the property by right of survivorship, but there was no legal bar to the grant of a Succession Certificate to a member of a joint Hindu family who obtained the property by survivorship in respect of shares of joint stock companies standing in the name of the deceased coparcener if he chose to apply for a Succession Certificate as a legal representative of the deceased.

In *Re the Goods of Madho Prasad*(^r) certain bank shares were held in the name of the father who was a member of a joint and undivided Hindu family. The shares were deposited in the bank but the bank refused to hand over the same without the production of letters of administration. Thereupon letters of administration were applied for and granted and exemption from duty was claimed on the authority of *Keshavlal v. The Collector of Ahmedabad*. It was urged that the necessity for application had arisen as the Imperial Bank had refused to hand over the shares without the production of letters of administration or a Succession Certificate. It was held that the Court was not concerned with the question whether the Imperial Bank was right or wrong in its demand but if the applicant chose to apply for letters of administration to comply with the wishes of the Imperial Bank he had no option but to pay the full Court fee. The Court dissented from the view taken by the Full Bench in *Keshavlal's* case.

Patna High Court Decision.—In *Ram Prasad v. The Collector of Shahabad*(^s), the Patna High Court has also considered the same question. In that case an application for letters of administration was made in respect of the property consisting of Government Loan notes and deposits in the banks and the shares of a limited company, and exemption was claimed from the payment of Court fees on the ground that it was the property of a joint Hindu family and must be treated as trust property and therefore not liable to *ad valorem* Court fee. Reliance was placed on the *Collector of Kaira v. Chunilal*, and in *re the Goods of Pokurmull Augurwallah*, but Wort, J., held that he preferred to follow the decision in the case of *Madho Prasad*, and the reasoning of the learned Judge in that case.

Rangoon High Court Decision.—In *T. R. Gopalaswamy Pillay v. Meenakshi Ammal*(^t), a Hindu who was governed by the Mitakshara school of Hindu law died leaving a younger brother who applied for letters of administration alleging that he was the survivor of an undivided family consisting of himself and the deceased. The application was opposed by the widow of the deceased and also by the daughter of the deceased. His Lordship Ormiston, J., after examining the text of the Hindu law expressed the opinion that just as a deceased coparcener cannot die testate in relation to coparcenary property, he cannot die intestate in relation thereto

(^q¹) 52 All. 252; A. I. R. (1930) A. 252.
(^r) 57 All. 881.

(^s) 17 Pat. 542.
(^t) 7 Rang. 41.

because at the moment of his death his interest therein passes by survivorship to the other coparcener. The plaintiff's application therefore for letters of administration failed because the deceased had left no estate in respect of which he was intestate. His Lordship then examined the authorities on this point of the Calcutta, Madras and Bombay High Courts. His Lordship says that a way out of the difficulty may be to apply for a limited grant as suggested in some of the Bombay cases and not for a general grant or to incorporate the joint family under the Indian Companies Act. The application was accordingly dismissed and the order made was that general letters of administration such as were applied for could not be granted to the surviving member of a joint Hindu family governed by the Mitakshara school in respect of the property of the family.

Lahore High Court Decision.—In this state of the case law the question recently cropped up before the Lahore High Court in *Sri Ram v. The Collector of Lahore(u)*, and the question was referred to a Full Bench. The facts of the case are that a Karta of a joint Hindu family governed by the Mitakshara law had purchased from the funds of a joint family certain shares of the Imperial Bank of India and of the Reserve Bank of India in his own name alone. On his death the eldest male member of the family firm and the Karta wrote to the banks to transfer the shares in his name but the banks declined to do so unless letters of administration or a Succession Certificate granted by a competent Court were produced. The Imperial Bank relied on Schedule 2, Regulation II, of the Imperial Bank of India Act, XLVII of 1920 as amended by Act III of 1934 and the Reserve Bank on sec. 56(5) Reserve Bank of India Act II of 1934. A petition was presented under sec. 278/256 of this Act for the grant of letters of administration in respect of the shares only and the Collector intervened and urged that *ad valorem* Court fee should be paid. It was urged on behalf of the petitioner that the shares belonged to the joint Hindu family and not to the deceased personally and were held by him in trust for the family, and therefore no Court fee was payable under sec. 19(D) of the Court Fees Act. The Lower Court did not accept the contention and ordered that the fee should be paid. An appeal was preferred. The Division Bench in view of the conflicting decisions of the various High Courts and the general importance of the question involved, referred the case to the Full Bench. The Full Bench held, after reviewing the authorities, that the legal estate in the shares in question had not passed by survivorship and consequently the application for grant of letters of administration by the surviving coparcener limited to the shares in question was competent, that the shares in question having been held by the deceased in trust for the family, sec. 19(D) applied and no duty was payable in respect thereof.

Conclusion.—These conflicting decisions lead to the following conclusion : (1) The *Bombay High Court* holds the view that it is competent to grant limited letters of administration in respect of shares or deposits and no Court fee is payable, the property being held by the deceased as a trustee, (2) The latest view of the *Calcutta High Court* is that it is not competent to grant letters of administration in respect of joint family property. As regards the payment of Court fees, it agrees with the view of the *Bombay High Court* that duty is not payable. (3) The *Madras High Court* holds the view that it is competent for the Court to issue letters of administration but the Court fee must be paid on the share of the deceased in the property for which letters are applied. (4) The *Allahabad High Court* holds conflicting views, but the latest view is that it is competent to grant letters of administration but the Court fee must be paid. (5) The *Lahore High Court* agrees with the *Bombay* view and holds that it is competent to grant letters of administration, but the property is exempted from payment of Court fees.

(u) 23 Lah. 717 (F. B.); A. I. R. (1942) L. 173.

(6) The *Patna High Court* agrees with the view taken by the *Allahabad High Court* and holds that if letters of administration are applied for and granted, Court fee must be paid. (7) The view of the *Rangoon High Court* is that it is not competent for the Court to grant letters of administration in respect generally of all the property belonging to a joint family.

213. (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Right as executor
or legatee when
established.

(2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in "clauses (a) and (b) of section 57".

[Clause (1) is sec. 187 of the *Succession Act X of 1865*; Clause (2) is sec. 331 of the *Succession Act X of 1865* and sec. 2 of the *Hindu Wills Act XXI of 1870* as amended by *Act XVIII of 1929*].

Clause (2) has been amended by *Act XVIII of 1929* as follows :

4. In sub-section (2) of section 213 of the said Act, for the word "class" the word "classes" and for the words and figures "sub-section (1) of section 57" the words, letters and figures "clauses (a) and (b) of section 57" shall be substituted.

Amendment of
section 213 Act
XXXIX of 1925.

The effect of the amendment is that it excludes all wills falling under clause 2 of section 57, viz., the wills and codicils of any Hindu, Buddhist, Sikh or Jain made on and after 1st September 1870 within the territories of the Governor of Bengal and in the ordinary original civil jurisdiction of the High Courts of Madras and Bombay and all wills and codicils relating to immoveable properties situate within those territories. It follows, therefore, that probate of the will or letters of administration with the will annexed are essential in the following cases :—

Probate when necessary.—(1) Of all wills and codicils of Europeans, East Indians, Armenians, Jews and Parsis, and of Indian Christians. As regards Indian Christians a Bill was introduced to exempt them from the operation of this sec. but it was not passed. (See Bill published in the *Gazette of India*, Part V, under date 7th August, 1948).

(2) Of all wills and codicils of Hindus, Buddhists, Sikhs or Jainas made on and after 1st September 1870 within the territories subject to the Governor of Bengal and in the towns of Madras and Bombay and wills made outside those territories so far as they relate to immoveable property within those territories.

Probate when not necessary.—(1) No probate is necessary in case of wills of Hindus, Jainas, Sikhs, and Buddhist made prior to 1st September 1870(v).

(2) No probate is necessary of the wills of Hindus, Jainas, Sikhs, and Buddhists falling under clause(c) of sec. 57.

Sub-section (2)

The words "this section" used in clause 2 should be read as "the preceding sub-section." Sec. 57 of this Act provides that the Provisions of Part III which are set out in Schedule III shall subject to the restrictions and notifications apply

to the three categories of wills mentioned in sec. 57 clause(c) of that section makes Part VI as set out in schedule III applicable to all wills and codicils made by Hindus etc. made on or after 1st January 1927. But this sub-section exempts all such wills from the necessity of probate. Unless the will falls within sub-sections (a) and (b) of sec. 57 it is not incumbent on the executor of the will of a Hindu falling within sub-section 3 of sec. 57 to take out probate(w).

(3) No probate is necessary in the case of a will of a Hindu made in an Indian state relating to property situate in that state(x).

(4) No probate of the will of a Mahomedan is necessary(y). Executors of the will of a Mahomedan can sell and convey the testator's property without obtaining probate or obtaining the consent of all the heirs. The will may be tendered in evidence and proved in any proceeding without probate(z).

(5) No probate is necessary in case of wills of Khojas(u).

(6) No probate is necessary for a person claiming an appointment as guardian under a will(b).

(7) No probate is necessary where the assets do not exceed Rs. 2,000/-. Certificate of the Administrator-General under sec. 31 of the Administrator-General's Act III of 1913 is sufficient(c).

(8) No probate is necessary in the case of wills made by Hindus of the Punjab relating to immoveable property situate in the Punjab(d).

Filing of Suits by Executors.

Under this section the grant of probate is not a condition precedent to the institution of the suit in order to claim a right as executor or a legatee under the will. Provisions of this section are complied with if probate is obtained before the decree is passed, though after the commencement of the suit(e). But an executor who has not obtained probate can be sued as defendant when he has intermeddled with the estate of the testator(f).

The practice of the Bombay High Court to pass a decree, without production of probate at the trial, but to order that the decree should not be sealed until the probate is granted, is not correct practice(g). The suit should not be dismissed but reasonable time may be given to enable the party to produce probate(h).

The cases decided by the various High Courts on this subject are given in the foot note(i). The English practice is also to the same effect, (see Williams on

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| (w) <i>Ahemad v. Ghisia</i> , A. I. R. (1945) N. 237. | (e) <i>Bhudeb Chandra v. Bhikshakar</i> , A. I. R. (1942) Pat. 120; <i>Mayappa v. Supramaniam</i> , 43 I. A. 118; at p. 119; <i>Gopal Lal v. Amulya Kumar</i> , 59 Cal. 911. |
| (x) <i>Peoibai v. Motumal</i> , A. I. R. (1937) S. 84; 168 I. C. 56; 31 S. L. R. 11. | (f) <i>Lakhya v. Uma Kanta</i> , 14 C. W. N. 256 at 258; <i>Khajeh Habibullah v. Ananga</i> , (1942) 2 Cal. 363; 46 C. W. N. 719 at pp. 724-725; <i>Lal Bihari v. Nagendra Nath</i> , 22 C. L. J. 266. |
| (y) <i>Shaik Moosa v. Shaik Essa</i> , 8 Bom. 241; <i>Sakina v. Mahomed</i> , 37 Cal. 839; <i>Ganapathi v. Sivamalai</i> , 36 Mad. 575; <i>Sir Mahomed Yusuf v. Hargowandas</i> , 47 Bom. 231. | (g) <i>Raichand v. Jivraj</i> , 56 Bom. 65; 33 Bom. L. R. 1372. |
| (z) <i>Sakina Bibee v. Mahomed</i> , 15, C. W. N. 185; see also <i>Haji Mahomed Miha v. Musaji Esaji</i> , 15 Bom. 657. | (h) <i>Kalyansa v. Tulsabai</i> , A. I. R. (1931) Nag. 181. |
| (a) <i>Abdul Karim v. Karmali Rahimtula</i> , 22 Bom. L. R. 708. | (i) <i>Chandra v. Prasanna</i> , 38 Cal. 327 (P. C.); <i>Yousef v. Islam</i> , 33 Bom. L. R. 1222; <i>Gopal v. Amulyakumar</i> , 59 Cal. 911; <i>Prabhatnath v. Ramendrakumar</i> , 61 Cal. 1081. |
| (b) <i>Pahan Alikhan v. Bai Panibai</i> , 19 Bom. 832; <i>Amirthavalliammal v. Sironmane Ammal</i> , (1938) Mad. 757. | |
| (c) <i>Narayana v. Pandurang</i> , 34 Bom. 506. | |
| (d) <i>Sohan Singh v. Bhag Singh</i> , A. I. R. (1934) L. 599. | |

Executors 12 Ed., pp. 190-191). According to the English practice where an executor is in *actual* possession of the property he has got to produce probate before he can maintain an action in respect of that property.

This section requires either grant of probate of the will under sec. 222 or the grant of letters of administration with the will annexed under secs. 232, 233 and 234 or the grant of letters of administration with a copy of an authenticated copy of the will annexed under sec. 228.

As regards succession certificate all that sec. 214 requires is that a certificate shall be produced before the decree is drawn up(j).

“Right as Executor or Legatee”.

This section requires production of probate only in two cases: (1) when a person wants to establish the right as executor or (2) when he wants to establish his right as legatee. It is not necessary that the person who wants to establish the right should himself prove the will. If the will is once proved that would entitle any legatee to obtain relief(k). If a legatee to whom the letters of administration with the will annexed are granted dies, it is not necessary to prove the will again(l).

Unprobated Will—Admissibility of, in Evidence.—The question whether an unprobated will of which probate is compulsory under this section can be admitted in evidence and for what purpose has given rise to a conflict of decisions. The Madras High Court has held that, though an executor can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever(m). In *Caralapathi v. Cota*(n) the same Court held that sec. 187 of the Act of 1865, (present sec. 213) did not debar a *defendant* from relying on a will in respect of which no probate or letters of administration were granted, as the defendant was not seeking a right to establish a right as executor or legatee. But in *Lakshamma v. Ratonamma*(o) this decision was not approved and it was held that sec. 187 of the Act of 1865 not only affects the establishment of the right to a legacy by the legatee but also debars a person who desires to establish the legatee's right merely as a *jus tertie* for the purpose of his defence. *Caralapathi v. Cota* was also doubted in *Parthasarathy v. Subbaraya*(p). It was held in that case that under sec. 187 a person who has to prove his title from a will whether that person is plaintiff or defendant cannot do so without producing probate. But in *Ganshamdas v. Saraswatibai*(q), and *Ganta Daniyelu v. Gunti Yesu*(r) a contrary view was taken *viz.* that sec. 187 does not debar a defendant putting forward the existence of a will though unprobated in answer to the plaintiff's claim to a share in the intestate's property.

In this state of law the matter again came up before the Madras High Court in *Ghanshamdass v. Gulab Bi*(s) and the following question was referred to the Full Bench. “Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the will is not probated and no letters of administration with the will annexed have been granted,” and the answer was that a defendant can rely on an unprobated will provided he does not do so in order to establish a right under the will. Phillips, C. J., in delivering the judgment of the Full Bench observed, “It was argued that it is sufficient answer to the plaintiff's case to allege and prove the existence of a will; for in that case the plaintiff who would be the heir in case of intestacy would no longer have any right. This rather ignores

(j) *Shantaram v. Shantaram*, 40 Bom. L. R. 964.

(k) *Purshottam v. Kala*, 26 Bom. 301.

(l) *Chandra v. Prasanna*, 38 Cal. 327.

(m) *Janaki v. Dhanu Lal*, 14 Mad. 454.

(n) 33 Mad. 91.

(o) 38 Mad. 474.

(p) 45 M. L. J. 175.

(q) A. I. R. (1925) M. 861.

(r) A. I. R. (1925) M. 1110.

(s) 50 Mad. 927 F. B.

one point which, I think, is important namely that the plaintiff being the heir under the intestacy which must be presumed until a will is proved is entitled to succeed to the property, unless it can be shown that his title has been displaced... The mere existence of the will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the will. This he cannot do by virtue of the provisions of sec. 187 (present section 213). I would, therefore, hold that the *defendant* cannot use an unprobated will as a defence."

Following this decision the Calcutta High Court has held that where the title to property is founded on the will it can only be established by probate or letters of administration with the will annexed(*t*). The earlier decisions of the same Court on the subject are *Achyutanandas v. Jagannath(u)* and *Prayag Kumar v. Siva Prasad(v)* where it was held that sec. 187 (which is incorporated in the Hindu Wills Act) does not debar the use of a will in evidence for a purpose other than the establishment of a right as executor or legatee, *e.g.*, in an application for the appointment of the guardian of a minor, the Court is bound to consider a will, although probate is not granted(*w*). In *Durga Pada v. Atul Chandra(x)* it was held that to establish a title under the will probate or letters of administration with the will annexed were necessary. The latest decision of the Calcutta High Court is *Jogendra Nath v. Makham Lal(y)* where the plaintiff claimed certain land as the heir of his father and the claim was resisted on the ground that the father of the plaintiff had left a will by which he had dedicated the property to the family god. It was held that the will not having been probated was not admissible in evidence to defeat the plaintiff's claim simply because of the provision of the will. Unless and until the property is effectually disposed of by the will the right of a Hindu heir to take by inheritance will not be defeated simply by provision in the will prohibiting that heir from taking it. It was held in this case that the prohibition contained in this section was not limited to the case where the claimant is himself the executor but it covers the case where the defendant claims as executor or legatee. The prohibition, however, does not extend beyond the question of establishment of the right as executor or legatee. This section is no bar to prove the will for collateral purposes or for its construction.

The Patna High Court holds the same view(*z*).

In cases of wills of persons coming within clause (2) as probate is not necessary a person can establish his right as an executor or as a legatee without the grant. In such cases it is for the Court to determine whether the will is genuine and valid and whether it confers upon the person claiming the right which he claims to establish(*a*).

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons.

214. (1) No Court shall—

- (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on

(t) *Ranjit Kumar v. Subodh Chandra*, A. I. R. (1937) C. 252.

(u) 21 C. L. J. 96.

(v) 42 C. L. J. 280.

(w) *Sarala Sundari v. Hazari Das*, 42 Cal. 953.

(x) (1938) 1 Cal. 75.

(y) (1942) 2 Cal. 13; A. I. R. (1942) C. 401.

(z) *Mahabir Das v. Udit Narain*, 17 Pat. 594; A. I. R. (1938) Pat. 613.

(a) *Bhagwansang v. Becharadas*, 6 Bom. 73.

succession to be entitled to the effects of the deceased person or to any part thereof, or

- (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,

except on the production, by the person so claiming, or—

- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or
- (ii) a certificate granted under section 31 or section 32 of the Administrator General's Act, 1913, and having the debt mentioned therein, or
- (iii) a succession certificate granted under Part X and having the debt specified therein, or
- (iv) a certificate granted under the Succession Certificate Act, 1889, or
- (v) a certificate granted under Bombay Regulation No. VIII of 1827 and, if granted after the first day of May, 1889, having the debt specified therein.

(2) The word “debt” in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

[This is sec. 4 of the Succession Certificate Act VII of 1889. The words “On succession” in clause (a) have been newly added].

Sub-sec. (1) (a)

“On Succession.” These words were not in the Succession Certificate Act VII of 1889. The words were inserted to except the cases where the claim to the effects of the deceased is based on survivorship(b). These words have a restrictive and not a widening effect and the old decisions are still apposite(c). Under the old Act the rulings of the different High Courts were not uniform. The Madras High Court held and that a certificate under the said Act was necessary before a decree could be passed(d). *Vairavan v. Srinivasachariar* was the case of a Hindu son succeeding to the self-acquired properties of his deceased father by inheritance, but from the remarks of the learned Judges in that case it appears that in their opinion a certificate under the Act would be necessary even in the case of the plaintiff succeeding to the deceased creditor by survivorship, and not as an heir, as the Act according to them was for the safety of debtors. But in later decisions of the same High Court the view taken in *Venkataramanna v. Venkayya* was not approved and the case was subsequently overruled(e). In *Pichaickuttia v. Rangandan*(f) it was held that the view that a succession certificate is not necessary in the case of a debt due to a member of a joint Hindu family was correct. In *Ramnath*

(b) *Kissanlal v. Tilak Chandra*, 43 C. W. N. 1218.

(c) *Sheetalchandra v. Lakshmanee*, 63 Cal. 15.

(d) *Venkataramanna v. Venkayya*, 14 Mad. 377;

Vairavan v. Srinivasachariar, 44 Mad. 499.

(e) *Subramanian v. Rakku*, 20 Mad. 232 ;

Pallam v. Bapanna, 22 Mad. 380.

(f) 28 M. L. J. 328.

v. *Subramania(g)*, it was held that even where the suit is by an adopted son of the deceased when the adoption is after the death by the widow of the deceased a succession certificate is not necessary to recover a family debt. But in the case of an undivided Hindu son who acquires the self acquired property of his deceased father by inheritance and not by survivorship, if he sues to recover money which was the self acquired property of his father, a succession certificate must be produced before a decree can be passed in his favour(h).

The Bombay High Court, *Raghavendra v. Bhima(i)*, and has held that under the Succession Certificate Act, 1889, the plaintiff did not require a certificate where his claim was for family property by right of survivorship. *Venkataramanna v. Venkayya* is referred to by Sargeant C. J. in that case and is dissented from. According to the Bombay decisions, if the debt was a family debt, it was not part of the "effects" of the deceased, and no certificate was necessary. The same view has been adopted by the Judicial Commissioner of the Central Provinces, (Vol. 9, of Central Provinces, Law Reports, p. 65).

The result of the various decisions under Act VII of 1889 can be summarised as follows :—

In the case of a family governed by the Mitakshara law, a succession certificate is not necessary to recover the debt due to the joint family(j). A son can maintain an action without a certificate to recover a debt due to the joint family(k); but it must be proved that the debt is a joint family debt(l). Where the plaintiff family is admitted or proved to be a joint family, and there is no direct evidence of the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt, and no certificate is necessary(m). But if the suit is on a promissory note which stands in the name of the manager alone and after his death the other coparceners sue to recover the amount, it was held that the coparceners must obtain the certificate(n).

The amendment of sub-clause (a) seem to give effect to the Bombay view. The Calcutta High Court in *Sheetalchandra v. Lakshiminee* (supra), has adopted the same view and has held that this section applies to the case of a person claiming on succession to the goods of the deceased. It does not apply to the case where the claimant has obtained property not as an heir but by survivorship, and that the words "on succession" have restrictive effect. In *Secretary of State v. Parijat(o)*, it was laid down that sec. 214(a) had no application where no relationship of creditor and debtor existed. In that case an application was made under sec. 302 for directions that the Administrator-General who had obtained probate should pay to the applicant the share of her son in the residue of the estate. The Administrator-General contended that the applicant should obtain a succession certificate to her son's estate. It was held that no certificate was necessary.

"Pass a Decree"

This section is mandatory and it prevents the Court from *passing* a decree against the debtor of a deceased person for payment of his debt unless the person claiming to be entitled to the *effects* of the deceased person produces, (1) a probate,

(g) 28 M. L. J. 372.

(h) *Viravan v. Srinivasachariar*, 44 Mad. 499 (F. B.).

(i) *Raghavendra v. Bhima*, 16 Bom. 349; (see also *Ram Ranujaya v. Parmatmanand*, A. I. R. (1938) Pat. 380.

(j) *Mathura v. Durgawati*, 36 All. 380.

(k) *Sital Prosad v. Katju*, 26 C. W. N. 488.

(l) *Ramehander v. Bapu*, 16 Bom. 240; *Pateshuri v. Bhagwati*, 17 All. 578.

(m) *Jagmohandas v. Allu Maria*, 19 Bom. 338; *Vithal v. Gotiya*, 1 Bom. L. R. 197.

(n) *Pera Reddi v. Mohamed*, 1 M. L. J. 702; *Shantaram v. Shantaram*, 40 Bom. L. R. 964.

(o) 63 I. A. 61.

or (2) letters of administration, or (3) a certificate under the Administrator-General's Act, 1913, mentioning the debt sought to be recovered, or (4) a succession certificate under Part X of this Act mentioning the debt, or (5) a succession certificate already granted under the Succession Certificate Act, 1889, (that Act is repealed by the present Act, so no more certificate can be granted under that Act), or (6) a certificate granted under Bombay Regulation No. 8 of 1827(*p*). A grant made by a Native State for the recovery of debt due in British India will not be recognized(*q*).

The object of this enactment is twofold—to facilitate the collection of debts and to regulate the administration on the one hand and to protect the debtors and to afford them complete discharge on the other hand(*r*). Therefore, if a person sues in a representative capacity, the Court requires that person to furnish proof by obtaining a grant of probate or letters of administration or a succession certificate. If pending the suit to recover money the plaintiff dies and another person is substituted in his place no decree can be passed in favour of the substituted plaintiff without the production of a succession certificate(*s*). If the suit is started by a creditor who dies pending the suit and his legal representatives are brought on the record under Order 22 of the Code of Civil Procedure the necessity of obtaining the succession certificate cannot be avoided(*t*).

This section does not debar a person from paying a debt to the executors or to the heirs of a deceased Hindu or Mahomedan, though no probate or letters of administration or a certificate may have been obtained and such payment may operate as a discharge to the debtor, but care should be taken when payment is made to an heir to see that all the heirs sign the receipt(*u*). Although under sec. 213(2) an executor of the will of a Mahomedan or of a Hindu in respect of wills mentioned in that section is not bound to obtain probate, still he is not exempted from the requirements of this section. If he files a suit to recover a debt due to the testator he must produce a succession certificate(*v*). In the case of a Mahomedan will he must produce the probate. Probate will not be granted limited to the collection of debts(*w*).

The words "pass a decree" indicate that the production of a succession certificate is not a condition precedent to the institution of a suit; it is sufficient if the certificate is produced at the time of passing the decree. If a succession certificate is produced before the decree is made, it is sufficient(*x*). It may be produced even in the Appeal Court before the decree is passed(*y*). The Court may even give time to the plaintiff to obtain a certificate and may not dismiss the suit(*z*). A provisional decree may be passed allowing the production of a succession certificate within a reasonable time(*a*). But if the plaintiff fails to produce the certificate even after the time is given, the Court can dismiss the suit(*b*). But if a decree is passed without the production of a succession certificate the decree is not a nullity(*c*). But in *Abdul Satar v. Satiyabhushan*

(*p*) *Narayan v. Tatia*, 15 Bom. 580.

(*q*) *Manasing v. Amad Kunhi*, 17 Mad. 14.

(*r*) *Pranhisto v. Nobodip*, 8 Cal. 869.

(*s*) *Vasquez v. Pragji*, 16 Bom. 19; *Nepusi v. Nasirudin*, 12 C. L. J. 400; *Abdul Satar v. Satiyabhushan*, 35 Cal. 767.

(*t*) *Abdul Majid v. Shamshevali*, A. I. R. (1940) B. 285.

(*u*) *Pathummati v. Vittil*, 26 Mad. 734.

(*v*) *Ramulte v. Padmanabha*, A. I. R. (1932) M. 801.

(*w*) *Sumitrabai v. Vishweshwar*, 47 Bom. L. R. 980.

(*x*) *Govindappa v. Kondappa*, 6 M. H. C. R. 181; *Gulshan v. Zakir*, 42 All. 549.

(*y*) *Murlidhar v. Mohini*, 19 C. W. N. 794 (note).

(*z*) *Fateh Chand v. Muhammad*, 16 All. 259 (F. B.); *Manasing v. Amad*, 17 Mad. 14; *Shuja v. Ram*, 20 All. 118; *Virbharrappa v. Shekabei*, (1939) Bom. 245; A. I. R. (1939) B. 188; 41 Bom. L. R. 249.

(*a*) *Maung Po Hwa v. Ma Ngwe*, (1937) R. L. R. 396; A. I. R. (1937) R. 470; *Baldev v. Peoples Bank of North India*, A. I. R. (1938) Pesh. 1.

(*b*) *Batashi v. Mahesh*, 15 All. 555.

(*c*) *Khanderao v. Rowjee*, 15 Bom. 105; *Abdul Majid v. Shamshevali*, (1940) Bom. 515; A. I. R. (1940) B. 285.

(supra) it was held that a grant of certificate after the passing of the decree is not valid in law.

“Person Claiming on Succession”

The only person who is required to produce the certificate under this section is the person who claims on succession to the effects of the deceased and includes his assignee(d). Even in case of Mahomedans a suit to recover a debt due to the estate will not lie unless a succession certificate or a certificate under the Administrator-General's Act X is granted(e). A purchaser of a debt sold in execution of a decree is also a person claiming to be entitled to the effects of the deceased and must obtain a certificate to recover the debt(f). But a receiver is not a person claiming on succession and no certificate is necessary to entitle him to recover the debt(g). In an administration suit if a receiver is appointed he can recover the debts due to the estate without succession certificate(h). A curator also stands in the same position and no certificate is required(i). A trustee is not required to obtain a certificate to enable him to recover the debt due to the trust estate(j). A Mahant of a Math is not required to obtain a certificate to recover the debt due to the endowment(k).

Assignee of a Deceased Creditor :—If the heir of the deceased person to whom the debt was due assigns the debt without taking out a succession certificate the assignee cannot realize the debt without obtaining a succession certificate(l). But if the assignee has already obtained a certificate and then assigns the debt, the assignee is not required to take out a fresh certificate(m). If the assignment of the debt is made first and the succession certificate to the assignee subsequent to such assignment, it perfects the title of the assignee who can sue to recover the debt without obtaining a certificate in his own name(n). Even a legal representation as an assignee of a debt cannot sue to recover the debt without a succession certificate(o). In *Mancharam v. Bai Mahali*(p) it was held that even a purchaser at an auction sale of a debt as a part of the effects of the deceased cannot recover the debt without a certificate.

Clause (1) (b)

Execution Proceedings.—This clause prohibits the Courts from proceeding to execute the decree unless a succession certificate is produced. A decree obtained by a person trading as a firm cannot be executed by his son without the production of a certificate(q). Application for execution may be made without the certificate but no process will be issued until the certificate is produced(r). If the decree is in favour of two persons and one of them dies the survivor can proceed to execute it without certificate, unless the debt due was part of the separate property of the deceased(s). This clause only bars the institution of execution proceedings by a person claiming on succession and does not bar the continuance of the proceedings if the execution proceedings have already been started by the deceased. His legal representatives may be substituted in his place without any succession certi-

(d) *Karuppasami, v. Pichu*, 15 Mad. 419;

Gulshan v. Zakir, 42 All. 549.

(e) *Virbhadrappa v. Shekaba*, 41 Bom. L. R. 249.

(f) *Maneharam v. Bai Mahali*, 18 Bom. 315.

(g) *Harihar v. Harendra*, 37 Cal. 754.

(h) *Anil Chandra v. Indian Economic Ins. Co. Ltd.*, (1941) 2 Cal. 221; *Ramaswami v. Doraisami*, A. I. R. (1948) M. 210.

(i) *Babasab v. Narsappa*, 20 Bom. 437.

(j) *Mallikarjuna v. Sridevama*, 20 Mad. 162 (P. C.).

(k) *Jogendra v. Ramchandra*, 20 Cal. 103.

(l) *Gulshan Ali v. Zakir Ali*, 42 All. 549.

(m) *Rang Lal v. Annu Lal*, 36 All. 21.

(n) *Arunachelam v. Malhu*, 42 Mad. 130, *Tairavan v. Shreenivasachariar*, 44 Mad. 499 (F. B.).

(o) *Shodone Mohaldar v. Halalkhore Mohaldar*, 4 Cal. 645.

(p) 18 Bom. 315.

(q) *Bhagwan v. Hiraji*, 34 Bom. L. R. 1112.

(r) *Govindappah v. Kondappah*, 6 M. H. C. R. 131; *Chinniram v. Hanmanta*, 15 Bom. 265; *Kattan Singh v. Ram Charan*, 18 All. 34.

(s) *Raghvendra v. Bhima*, 16 Bom. 349.

ificate(*t*). Since the new rule O. 22r. 12 of the Code of Civil Procedure was made the question whether execution proceedings abated on death has been set at rest. If execution proceedings are permitted without succession certificate, the High Court will not interfere in revision(*u*).

Clause (2).

Debt.—The word “debt” used in this section does not include *rent*, revenue or profits arising from land used for *agricultural purposes* only(*v*). It will include rent of houses, buildings and tenements not so used. Arrears of rent accruing due in respect of premises comprised in the estate of the deceased for the period subsequent to his death can be recovered without a succession certificate(*w*). But this is *obiter*. But if the debt is existing in the lifetime of the creditor but which does not become due and until after his death, his heirs cannot obtain a decree without the production of a succession certificate(*x*). In this case it was held by the Full Bench that a “debt” is a sum of money which is presently payable or will become payable in future by reason of a present obligation and this section applies. “I do not think that the word ‘debt’ can be restricted to a liquidated sum of money actually due and payable to the deceased at the time of his death. The word must be understood as including not only debts due to the deceased at the time of his death, but also accruing due to his estate or ascertained due to his estate upto the day on which the inclusion of the debt in the certificate is applied for,” (per Benson J. in *Sabju v. Noordin*)(*y*). A sum payable upon a contingency is not a debt and does not become a debt until the contingency has happened(*z*). The word “debt” is a comprehensive term and should receive a liberal construction (*a*). The test to be applied in ascertaining whether a particular claim falls within the definition of the word “debt” is to see whether the Court is called upon to pass a personal decree against the debtor(*b*). A sum of money which certainly and in all events payable is a debt without regard to the fact that it is payable now or at a future time.

What is a suit for Debt?

The debt may have become due in the lifetime of the deceased or may become due and payable after his death. In both the cases a succession certificate is necessary(*c*). A suit for refund of price of goods sold is a suit for “debt” and a certificate is necessary(*d*). A suit to recover arrears of annuity is a suit for debt(*e*). Money deposited by an employee with his master as a security for good conduct is “debt” and if the employee dies letters of administration or a succession certificate is necessary(*f*). A suit to recover dower whether prompt or deferred is a suit for debt(*g*). Compensation money for property acquired under the Land Acquisition Act is “debt”(*h*).

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| (<i>t</i>) <i>Kshetra v. Azizulla</i> , 57 I. C. 902; <i>Balmukand v. Gobind Ram</i> , A. I. R. (1936) Pesh. 17; 161 I. C. 204. (See contra <i>Tejraj v. Rampyari</i> , A. I. R. (1938) Nag. 528). | <i>Sahadev v. Sheikh Sakhawat</i> , 12 C. W. N. 145. |
| (<i>u</i>) <i>Shuja Ali v. Ram Kuar</i> , 20 All. 118. | (<i>c</i>) <i>Bancharam v. Adya Nath</i> , 36 Cal. 936, (F. B.). |
| (<i>v</i>) <i>Nagendra v. Satadul</i> , 26 Cal. 536. | (<i>d</i>) <i>Penta Reddi v. Anki Reddi</i> , 22 Mad. 144 (note), 2 M. L. J. 34. |
| (<i>w</i>) <i>Brojendra Niladrinath</i> , 33 C. W. N. 1177 (F. B.); <i>Ranchordas v. Bhagubhai</i> , 18 Bom. 394. | (<i>e</i>) <i>Jagan Nath v. Bageshwar</i> , (1899) A. W. N. 217. |
| (<i>x</i>) <i>Bancharam v. Adya Nath</i> , 36 Cal. 936, (F. B.). | (<i>f</i>) <i>Ram Ranbijay v. Bachia Kuari</i> , A. I. R. (1939) Pat. 688. |
| (<i>y</i>) 22 Mad. 139. | (<i>g</i>) <i>Abdul Karim v. Magbul-un-Nissa</i> , 30 All. 315; <i>Ghafur Khan v. Kalandari</i> , 33 All. 327; (contra) <i>Mohamed v. Sarifan</i> , 16 C. W. N. 231; <i>Shadi Jan v. Wabis Ali</i> , 43 All. 493. |
| (<i>z</i>) <i>Bancharam v. Adya Nath</i> , 13 C. W. N. 965. | (<i>h</i>) <i>Brajendrasundar v. Niladrinath</i> , 57 Cal. 814 (F. B.); 33 C. W. N. 1177. |
| (<i>a</i>) <i>Annapurna v. Nalini</i> , 42 Cal. 10. | |
| (<i>b</i>) <i>Nanchand v. Yenawa</i> , 28 Bom. 680, | |

Insurance Moneys :—Insurance moneys payable under a life policy after the death of the insured is a debt within the meaning of this section(i). It was held in this case that it was a conditional and contingent debt. In *Oriental Government Security v. Venteddu*(j) it was held that the company was bound to pay the amount due under the policy to a person who had obtained a succession certificate as such moneys formed part of the estate of the deceased, when the provisions of the Married Women's Property Act did not apply. In *Vithal Rao v. Hannumantha*(k) the policy was an endowment policy and the moneys were payable to the assured if the assured attained a stated age or to his representatives if he died earlier. The assured died before the stated age and on a claim made by the son against the company it was held that the amount payable under the policy was a "debt" and a succession certificate was essential. In *Gresham Life Insurance Society Ltd. v. Collector of Etawah*(l) two questions arose for consideration (a) whether the contract of policy by which the assured agreed that the money would be paid to himself or to his assigns or to his executors or administrators was a binding contract and (b) whether if it was not, the company could insist on production of either probate or letters of administration or a succession certificate. It was held that sec. 214 applied and the company was right in insisting on the production of either probate or letters of administration or a succession certificate. The suit, however, was not dismissed but time was given to the plaintiff to obtain a succession certificate. On the first question it was held that the agreement that the money under the policy would be paid only to the assured or to his assigns or his executor or administrator was a good contract. The Calcutta High Court has also held similar view(m). In *Fazal Karim v. Mohmed Karim*(n) it was held that a policy of insurance, the premiums for which have been paid by a member of a joint Hindu family out of his separate estate was his self acquired property and came within the definition of "debt". The Rangoon High Court has gone a step further and has held that even if the policy provides for the payment to a person named in the policy it is necessary for that person to obtain letters of administration or a succession certificate(o). In all cases, therefore, if the insurance moneys are payable to the assured or his executors or administrators and where there is no trust under sec. 6 of the Married Women's Property Act either probate or letters of administration or succession certificate is essential.

If, however the holder of a policy of life insurance nominates a person under Sec. 39 of the Insurance Act to whom the moneys secured by the policy should be paid in the event of his death, then if the nominee survives the policy holder, no letters of administration or succession certificate is necessary. But if the nominee dies before the policy matures for payment the amount secured by the policy becomes payable to the policy holder and if he is dead then to his heirs or legal representatives or to the holder of a succession certificate. In that case letters of administration or a succession certificate is required to be produced.

But if the policy is effected under sec. 6 of the Married Women's Property Act, then no probate or letters of administration or a succession certificate is necessary to recover the moneys due under such a policy of insurance. In such a case a statutory trust is created and the persons entitled to recover the moneys are (a) the Official Trustee or (b) Special Trustee appointed by the High Court under Act XVII of 1864 sec. 10 (now the Official Trustees Act II of 1913). In *Cousins v. Sun Life Assurance Society*(p) the House of Lords held that a policy

(i) *Vishwanath P. Vaidya v. Mulraj Khatau*,
1 Bom. L. R. 590.

(j) 35 Mad. 162.

(k) 50 Mad. 412.

(l) 54 All. 1026.

(m) *Tulsi Debya v. Bibhuti Bhusan*, 41 C. W.

N. 952; *Ashu Tosh Ghosh v. Paratap Chandras*, (1937) 1 Cal. 433.

(n) A. I. R. (1942) Pesh. 42.

(o) *Daw Yu v. Sun Life Assurance Co.*, A. I. R. (1935) R. 211.

(p) (1933) 1 Ch. 126.

of insurance effected by a husband on his wife named therein, the money payable thereunder formed a part of the wife's estate, even if she predeceased her husband, as the wife took a vested interest in the policy moneys, when the policy was effected. Even if the policy is effected by a father for the benefit of his child a trust is created for the child against the father(q). (For further commentary on this subject see pp. 34 to 38).

The Indian law in this respect as enacted in Sec. 6 of the Married Women's Property Act is to the same effect. The provision as to nomination contained in sec. 39 of the Insurance Act do not apply to any policy of life insurance to which section 6 of the Married Women's Property Act applies, (see sec. 39 sub-sec. 7). This sub-section has been amended by the Insurance (Amendment) Act VI of 1946, which came into force on 20th March 1946. By the amending Act it is provided that the provisions of sec. 39 of the Insurance Act shall not apply to any policy of life insurance to which sec. 6 of the Married Women's Property Act, 1874, applies "or has at any time applied": "Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, as being made under this section, the said sec. 6 shall be deemed not to apply or not to have applied, to the policy."

The effect of this amendment is that if an express nomination is made even in the text of the policy itself in favour of wife or in favour of wife and children or any of them then there is no trust and sec. 39 of the Insurance Act would apply and if the nominee or all the nominees die before the policy matures for payment the amount secured shall be payable to the policy holder or to his heirs or legal representative in case of his death and letters of administration or succession certificate will be necessary. Hence a nomination even in the text of the policy does not attract the provisions of sec. 6 of the Married Women's Property Act and there is no statutory trust created in favour of the wife and/or children.

Provident Fund and Deposit of Employees :—Deposits made by an employee under the Provident Funds Act XIX of 1925 is a "debt" (see sec. 4) and if payment is made without the production of a succession certificate or letters of administration it is not good payment(r). But if the employee has nominated a person to whom the amount should be paid then the sum to the credit of the employee's account does not form part of the estate of the deceased and the employee cannot dispose of it by his will(s) and the nominee is not required to take out a succession certificate(t). According to sec. 3(2) of the Provident Funds Act of 1925 and the rules, the provident fund moneys due to a deceased subscriber in the absence of any nomination by him vests in the members of his family and cannot be said to form part of his assets(u).

Government Savings Bank Act V of 1873 :—Sec. 4 of the Act provides that if the depositor dies and probate of his will or letters of administration of his estate or a succession certificate is not produced within three months of the death of the depositor to the Secretary of the Government Savings Bank in which the deposit is made then :—

(a) if the deposit does not exceed Rs. 3,000 the secretary may pay the same to any person appearing to him to be entitled to administer the estate of the

(q) *In re Webb, Barclay's Bank v. Webb*, (1941) 1 Ch. 225.

(r) *Assam Bengal Railway Co., Ltd. v. Atul Chandra*, 41 C. W. N. 534, A. I. R. (1937) C. 314; *Latifanbai v. Sakinabai*, A. I. R. (1939) S. 107; I. L. R. (1939)

Kar. 432.

(s) *In the Goods of Stanley*, A. I. R. (1939) C. 642

(t) *In re Mrs. Daisey*, A. I. R. (1939) S. 52.

(u) *Stimpson v. Bennett*, A. I. R. (1946) Oudh 73.

deceased. (b) If the deposit does not exceed Rs. 100 then the money may be paid to any person entitled to receive it or to administer the estate.

Post office Cash Certificate Act XVIII of 1917 :—Sec. 3 of the Act provides that if a person dies and is at the time of his death the holder of a post office five-year cash certificate, payment of the sum due on such certificate may be made in the manner provided in the Government Savings Banks Act, 1873, for the payment of deposits and the provisions of secs. 4 and 9 of the said Act shall apply as if the holder of such certificate were a depositor in a Government Savings Bank and the sum due on such certificate were a deposit in such a bank and as if for the words “three thousand” in secs. 4 and 8 of the said Act the words “five thousand” were substituted.

Indian Securities Act X of 1920 :—Under sec. 3(2) of the Act the Government will only recognise the executor or administrator as the full owner of the Government security belonging to the estate of a deceased person whom he represents and whose name appears on the endorsement of such security. But sec. 4(a) provides that if the security is payable to two or more persons *jointly* and either or any of them dies the security is payable to the survivor or survivors of those persons and sec. 4(b) provides that when it is payable to two or more persons *severally* and either or any of them dies, the security is payable to the survivor or survivors of those persons or to the representatives of the deceased or to any of them. By Act XVIII of 1944 sec. 7 it is provided that subject to sec. 9 the executors or administrators of a deceased holder of a Government security and the holder of a succession certificate shall be the only persons who may be recognised by the Reserve Bank as having any title to the Government Security. Exception is made in the case of a manager or the sole surviving male member of a Hindu undivided family governed by the Mitakshara law.

What is not a Suit for “Debt”

A suit for account is not a suit for “debt”(v). A claim for liquidated damages is not a debt(w). On the death of a partner the right to sue for a debt due to the partnership survives to the remaining partner and the legal representatives of the deceased partner are not required to produce the succession certificate if brought on the record of the suit(x). The contrary opinion given in *Ram Narain v. Ram Chunder*(y) is not good law and the case was not followed in *Motilal v. Ghellabhai*(z). Where after the death of a partner his son sued for an account of the profits of the partnership and for payment of the share of his father without obtaining letters of administration or a succession certificate it was held that the same was not a “debt” as there was at the time of the death of the plaintiff’s father no present obligation to pay a liquidated sum and the succession certificate was not necessary(a). A suit for recovery of money in pursuance of a lease given by the mortgagee to the mortgagor is not a suit for debt and no certificate is necessary in a suit by the successor-in-interest of the mortgagee against the mortgagor(b). A mortgage is not a debt and a suit to enforce mortgage is not a suit for debt and certificate is not necessary(c). A suit to recover money due on a simple mortgage by sale of the mortgaged property is not a suit for recovery of a debt and no succession certificate is necessary but if a personal decree is prayed for against the mortgagor, representation is necessary(d). A suit for foreclosure is not a suit for debt(e).

(v) *Bissessar v. Durgadas*, 32 Cal. 418.

(w) *Subbanna v. Muneeka*, 18 Mad. 457.

(x) *Balkissen v. Kanhya Lal*, 17 C. L. J. 648.

(y) 18 Cal. 86.

(z) 17 Bom. 6.

(a) *Sabju v. Noordin*, 22 Mad. 139.

(b) *Mohammad v. Salahuddin*, A. I. R. (1937) Pat. 617.

(c) *Ramu v. Aghori*, A. I. R. (1938) Pat. 68.

(d) *Abdul Satar v. Satya Bhushan*, 35 Cal. 767; *Sahadev v. Sakhawati*, 12 C.W.N. 145.

(e) *Immanna v. Gurumurthi*, 16 Mad. 64.

The Allahabad High Court has held that a succession certificate is necessary in a suit for sale under sec. 88 of the Transfer of Property Act(f): But the case is dissented by the Madras, Bombay, Calcutta and Lahore High Courts(g). In *M. nahim v. Islam*(h) three persons were mortgagees, one of the mortgagees died and his heirs and two mortgagees sued for sale of the mortgaged properties and for personal decree in case of deficit. It was held that the representatives of the deceased mortgagee should first obtain probate or letters of administration.

Suit against heirs.—If a person dies leaving a will appointing executors but of which probate has not been granted any decree obtained against the heirs of the deceased is a nullity(i). But though the decree is a nullity a judgment against a person in possession of the estate of the deceased is at any rate sufficient to enable the plaintiff to bring a suit against an executor to have the decree satisfied(j). Also if some of the heirs are sued and subsequently the grant is made to one of them the decree will be good(k). In *Ratanbai v. Narayandas*(l), a Parsi executed a mortgage. After his death the mortgagee sued his heirs. No letters of administration were obtained by the heirs and a decree was passed. On appeal the defendants contended that the decree was a nullity, but the contention was negatived. But if a creditor files a suit against the heirs and obtains a decree and if letters of administration are subsequently granted to other persons the decree is a nullity(m). See also *Manni Gir v. Amar Jati*(n), as regards suit against some of the heirs of a deceased Mahomedan. Under Mahomedan law each heir inherits a separate and defined share and one heir can in no sense be said to represent the estate that has devolved on other heirs. The estate of a Mahomedan vests in each heir in proportion to the shares according to Mahomedan law. A decree, therefore, obtained against one heir cannot be binding on the share inherited by another heir(o).

215. (1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding :

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in

(f) *Fateh Chand v. Muhammad*, 16 All. 259 (F.B.)

(g) *Palaniyandi v. Veeramal*, 29 Mad. 77; *Nanchand v. Yenawa*, 28 Bom. 630; *Sow Chong v. Hafiz Bibi*, 12 Rang. 690; *Mahomed, v. Abdur*, 26 Cal. 839 and not followed in *Laehman Singh v. Natha Singh*; A. I. R. (1940) L. 401 (F. B.); *Kutawanta Bewa v. Karam Chand*, (1939) 1 Cal. 21.

(h) 38 Bom. L. R. 1222.

(i) *Sukh Nandan v. Rennick*, 4 All. 192; *Framji D. Ghaswala v. Adarji D. Ghas-*

walla, 18 Bom. 337; *Janaki v. Dhanu Lal*, 14 Mad. 454; *Matangini v. Chooney-money*, 22 Cal. 903; see *contra*, *Dinamoni, v. Elahadut Khan*, 8 C. W. N. 843.

(j) *Prosunno v. Kristo*, 4 Cal. 342.

(k) *Chuni Lal v. Osmond*, 30 Cal. 1044.

(l) 29 Bom. L. R. 900.

(m) *Sukh Nandan v. Rennick*, 4 All. 192; *Framji D. Ghaswala v. Adarji D. Ghaswala*, 18 Bom. 337.

(n) 58 All. 594 at p. 600.

(o) *Virbhadrappa v. Shekabai*, (1939) Bom. 232.

ignorance of such supersession shall be held good against claims under the probate or letters of administration.

[This is sec. 152 of the Probate and Administration Act No. V of 1881 and sec. 21 of the Succession Certificate Act No. VII of 1889.]

This section is a consolidated reproduction of sections 152 of the Probate and Administration Act V of 1881 and 21 of the Succession Certificate Act VII of 1889 both of which Acts are repealed by this Act. It enacts that if a succession certificate has been previously granted and subsequently a grant of probate or letters of administration is made, the latter grant supersedes the certificate and it is not necessary to have the certificate expressly revoked. But such supersession would not render ineffective so far as payments are made to the certificate holder by a person in ignorance of such supersession.

Sub-section (2) provides that if a suit has already been instituted by the holder of the certificate to recover the debt, the executor or administrator to whom the subsequent grant is made shall be substituted in place of the certificate holder.

216. After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

Grantee of probate or administration alone to sue, etc., until same revoked.

[This is sec. 260 of the Succession Act X of 1865 and sec. 82 of the Probate and Administration Act V of 1881. This section was not made applicable to Hindus, etc., by the Hindu Wills Act.]

This section is a corollary to section 211. It declares that after any grant of probate or letters of administration the executor or administrator to whom such grant is made are the only legal representatives of the deceased and all rights of action vest in them alone, until such grant is expressly revoked(p). This section does not mean "once an administrator always an administrator." The moment administration is complete the purpose of the grant is fulfilled and the administrator becomes *functus officio* and the grant stands revoked without any formal order of the Court(q). An executor who has not joined in the probate, or who has renounced cannot sue under this section(r). Order 31 r. 21 of the Code of Civil Procedure provides that the executors who have not proved their testator's will and the executors and administrators outside British India need not be made parties to the suit. Where a deceased person has left a will his heirs on intestacy do not represent his estate(s).

In *Malapa v. Devi(t)*, it was held that an administrator appointed under sec. 10 of Regulation VIII of 1827 did not become the legal representative, but see *contra*, *Mir Ibrahim v. Ziaulnissa(u)*, where it was held that so long as an appointment under sec. 9 of the Regulation lasted no one else could represent the estate.

(p) *Purshottam v. Kala*, 26 Bom. 301.

(q) *Kulwanta Bewa v. Karamchand*, 43 C. W. N. 4; 68 C. L. J. 8; A. I. R. (1938) C. 714.

(r) *Satyaprashad v. Motilal*, 27 Cal. 683.

(s) *Matangini v. Choonemoney*, 22 Cal. 908.

(t) 21 Bom. 132.

(u) 12 Bom. 150.

PART IX.

Probate, Letters of Administration and Administration of Assets of Deceased.

217. Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

[This is sec. 2 of the Succession Act X of 1865 and secs. 2 and 150 of the Probate and Administration Act V of 1881. The clause is amended so as to make it clear that it refers to intestate as well as testamentary succession, (See Report of the Joint Committee).]

The whole of Part IX deals with the procedure for the grant of probate and letters of administration and comprises sections 217 to 369.

This section corresponds to section 2 of the Indian Succession Act, 1865, and sections 2 and 150 of the Probate and Administration Act. As both these Acts have been repealed by the present Act, the language of the section is altered having regard to this Act. It enacts that the procedure to be adopted in making the grant shall be the procedure laid down in this Part of the Act.

CHAPTER I.

Of Grant of Probate and Letters of Administration.

218. (1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

[This is sec. 23 of the Probate and Administration Act V of 1881.]

Sub-sec. (1).

To whom Letters of Administration may be granted in the case of Hindus, Mahomedans, Buddhist, Sikhs or Jains.—If a Hindu or a Mahomedan dies intestate, letters of administration are not required to be taken in respect of his personal property, see [sec. 212(2)]. This section is an enabling section. It enacts that if an application is made in respect of the property of a deceased Hindu or Mahomedan intestate for the grant of letters of administration, then the

grant should be made to the person who according to the law of intestate succession would be entitled to the whole or any part of the intestate's estate. It is based on the rule "the grant shall follow the interest." In the case of "bairagi" or an ascetic, his preceptor is entitled to the letters of administration(v). In the case of a mahant letters of administration can only be granted to a person who is shown to have spiritual relationship with the deceased(w). When several persons apply for such grant, the Court is given discretion under clause (2), and when no such person applies, it may be granted to a creditor of the deceased (clause 3).

The rules for granting letters of administration in the case of other persons are more elaborate and the order in which such persons are entitled to the grant is laid down in sec. 219.

Joint Hindu Family.—The only person entitled to the grant of letters of administration under this section is one who according to the rules for the distribution of the estate would be entitled to the whole or any part of such estate. The surviving member of a joint Hindu family cannot be said to be entitled to the whole or any part of the property. There is no succession in an undivided Hindu family; there is no devolution of the property. In *T. R. Gopalaswamy v. Meenakshi*(x) the brother of the deceased claimed that he and the deceased formed a joint family and applied for letters of administration under this section. The widow and daughter denied that there was any joint family. Letters of administrations were refused. (For further commentary, see *ante*, p. 378). In granting or refusing probate or letters of administration the Court cannot go into the question whether the property is self acquired property or ancestral property(y). In *Bai Parvatibai v. Raghunath Laxman*(z), the petitioner made a petition for letters of administration to the estate of a deceased person named Mahadev Ramji Kalzunker. The petitioner was the widow of the deceased. The caveator claimed that the property left by the deceased was joint family property and that, therefore, the petitioner was not entitled to the grant of letters of administration. The question was whether in such circumstances, the grant should be made or not. In giving judgment Kania, J., said that it was not the province of the Testamentary Judge to determine whether the property covered by the will, or for which letters of administration were asked for, was the property of the deceased or not, or was the joint property belonging to the deceased and someone else. In *Ochavram v. Dotatram Jenkins* C. J. held that it was not the province of the Court to go into questions of title to the property on the hearing of a petition for letters of administration to the estate of a deceased person. In His Lordship's opinion a Testamentary Court dealing with the question of issuing a grant of probate was concerned to see whether the will was duly executed as required by law by a testator of sound and disposing state of mind. In case of grant of letters of administration, the Court had to see that the person properly entitled to represent the estate of the deceased according to the Succession Act had come to Court and was given the grant. It was no part of the duty of the Testamentary Judge to consider the question of title to property. Sec. 211 of the Succession Act expressly provided that the issues of probate or letters of administration did not vest in the executor or administrator the property which was claimed to belong to a joint family. In His Lordship's opinion a caveat could not be sustained on the ground that the property was a joint family estate. This was the uniform practice on the testamentary side and His Lordship saw no reason to differ from it. It was a practice based on sound reason. A caveator was not prejudiced, because he had the right to file a suit to

(v) *Collector of Deccan v. Jagat Chunder*, 28 Cal. 608.

(x) 7 Rang. 39.

(w) *Mohant Khazamdas v. Ram Saran*, 46 P. W. R. 1910.

(y) *Ochavram v. Dolatram*, 28 Bom. 644.

(z) *Times of India*, 27th Aug. 1940.

establish his title to the property. His Lordship, therefore, dismissed the caveat and ordered letters of administration to issue to the petitioner.

In this case it was held that it is not the function of the probate Court to go into the question whether there was a will or whether there was an intestacy, when letters of administration were applied for. This was also recognised by the Allahabad High Court(a) by the Calcutta High Court(b) and by the Lahore High Court(c)

Mahomedans.—Except as regards recovery of debts due to the estate of a deceased Mahomedan, no letters of administration are necessary to establish any right to the property of a Mahomedan who has died intestate, [sec. 212(2)]. But a Mahomedan beneficiary has right to have the estate duly administered. His suit for administration can take various forms; it may be an administration suit or a suit for partition or a suit for contribution. This right may also be enforced in a proper case by an application for the appointment of an administrator under this section(d). A Mahomedan will can be admitted to probate, although it purports to deal with more than one-third over which the testator has disposing power(e).

Of the Practice of Granting Letters of Administration.

This section only applies in cases of the intestacy of a Hindu or a Mahomedan. The grant should be of the whole estate and not of the part of the estate. Rule 627 of the Bombay High Court Rules provides that except by an order of the Judge no person entitled to a general grant will be permitted to take limited grant. In the *goods of Ramchand Seal*(f), it was laid down that if a Hindu takes out letters of administration, he must take out general letters. In granting the letters of administration it is the duty of the Court to consider whether there is any estate left to be administered(g). But if there is a will which has not been probated the question whether the estate has or has not been fully administered is not relevant and cannot be gone into by the Court(h).

Hindus.—As to the person entitled to the grant in case of Hindus, the Hindu law of inheritance will apply. A person who takes a present interest is preferred to one who has a contingent interest; on this principle the widow although she takes a limited interest is preferred to the reversioner who has a contingent interest(i).

Sub-sec. (2).

Under this sub-sec. although the Court has a discretion to grant administration to one or more persons it prefers a sole administrator to a joint administrator on the ground of convenience. It is only when the circumstances are sufficiently strong that it will be induced to make a joint grant(j). In *Nittyo Kali v. Kedar Nath*(k) two widows applied for grant, but the Court granted only to one, nor will the court associate another person who has no interest in the estate with the applicant(l).

Sub-sec. (3).

If no person entitled to the grant under clause (a) applies for letters of ad-

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| (a) <i>Brij Nath v. Chunder Mohan</i> , 19 All. 458. | (g) <i>Latif Chandra v. Bikantha</i> , 14 C. W. N. 463. |
| (b) <i>Raghu Nath v. Musst Pate Koer</i> , 6 C. W. N. 345. | (h) <i>Durgapada v. Atul Chandra</i> , 41 C. W. N. 1204; <i>Shreemati Indiu Prova v. Durga Charan</i> , 18 Pat. 828 at p. 834. |
| (c) <i>Mt. Laso Devi v. Mt. Jagatambha</i> , A. I. R. (1936) L. 378. | (i) <i>Lakshmi v. Nityananda</i> , 61 I. C. 61. |
| (d) <i>Mohammed v. Mohammad</i> , 40 Bom. L. R. R. 848 (P. C.). | (j) <i>In re Yeshwantibai</i> , 31 Bom. L. R. 999. |
| (e) <i>Abdul Rashid v. Minhazuis</i> , A. I. R. (1938) Nag. 173. | (k) 5 C. L. R. 368. |
| (f) 5 Cal. 2. | (l) <i>Annopurna Dasi v. Kallyani Dassi</i> , 21 Cal. 164. |

ministration it may be granted to a creditor. The word "creditor" includes a Mahomedan widow in respect of her unpaid dowry, but not her creditors(*k*). (For further commentary see page 311).

219. If the deceased has died intestate and was not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely :—

(a) If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Illustrations.

(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration.

(ii) The widow has married again since the decease of her husband. This is not good cause for her exclusion.

(b) If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(c) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate :

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(d) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(e) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

(f) When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.

(g) Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India.

[This section reproduces sections 200 to 207 of the Succession Act X of 1865. It applies only to Europeans, Indian Christians, and Parsis.]

Order in which Letters of Administration are Granted in case of Intestacy.—In the case of a European, a Parsi or an Indian Christian dying intestate only those who are connected with the deceased by marriage or by consanguinity are entitled to the grant of letters of administration in the following order:—

(a) Husband or widow. In case of a widow the Judge may, if he think proper, associate any person entitled to administration with her, (clause b).

A widow is not entitled to letters of administration in the following cases:—

- (i) If she has no interest in the estate of the deceased, *e.g.*, if she has barred herself of all her interest by a marriage settlement.
- (ii) If she is a lunatic.
- (iii) If she has misconducted herself. The word “adultery” used in ill(i) has the ordinary meaning of sexual intercourse with a man whether married or unmarried(l).
- (iv) If she is divorced(m).

The fact of a widow having married again is no objection to her being entitled to letters of administration. [ill. ii., cl. (a)]. If, however, the deceased has left children, the second marriage *might* induce the Court to prefer the child(n).

(b) Child or children. When there are sons and daughters, the practice of the Court is that a son is preferred to a daughter, unless there are material objections to him.

(c) Grandchild or grandchildren.

(d) Great-grandchildren.

(e) Father and mother. If an intestate is a widow or widower without issue or a bachelor or a spinster, the surviving parents are entitled to the grant. If both the parents are alive there is no preference as between father and mother, and either or both may apply. (Phillips Probate Practice, 4th Edn., p. 146).

(f) Mother (see proviso). Under sec. 43 when the father is dead, mother, brothers and sisters take equally the estate of the intestate. The proviso to this section applies to the case contemplated by that section. In such a case the grant will be made to the mother only.

In the case of Parsis under sec. 56 in Schedule II, Part II although the father's share in the property of the intestate is double the share of the mother, still the proviso to this section applies in that case also and the practice of the Bombay High Court is to grant the letters to the mother. This practice seems to be incorrect.

(g) Natural mother:—Where an illegitimate person dies intestate, if the mother is the only surviving parent, she is entitled to the grant.

(h) Brothers and sisters.

(i) Grandfather and grandmother.

(j) Uncles, aunts, nephews, nieces, great-grandparents.

(k) Cousins.

(l) Creditor. If none of the persons entitled is willing to take out administration a creditor may do so. The ground for granting administration to a creditor

(l) *Gananani v. Esunadian*, A. I. R. (1928) M. 797.

(m) *Re Nares*, 18 P. D. 35.

(n) *Webb v. Needham*, 1 Add. 494.

is that he may be enabled to recover his debt. Letters of administration may be granted to a creditor although the liabilities may be greater than the assets(o). His right depends on the discretion of the Court and the grant is not made to him until citation is served on all persons entitled to the grant. Creditor includes a secured credit and a surety(p).

In England a creditor is entitled to administration even when his debt is barred by limitation(q). In India it would seem that the Court would not grant letters of administration to a creditor whose debt is barred by limitation under the Limitation Act. Where more creditors than one apply, the grant will be made to one who has the largest claim(r).

Sometimes the creditors of the deceased without taking out letters of administration either take out an Originating Summons or file an administration suit on behalf of all the creditors and have a receiver appointed. Such practice is deprecated. In *In re Sutcliffe(s)* a creditor began proceedings for the appointment of a receiver before a grant of probate had been obtained by way of originating summons. It was held that such proceedings must be by writ and not by way of originating summons and the creditor must undertake, if necessary, to take steps to procure a grant to be made to himself.

For want as well of creditors as of next-of-kin the Court may grant letters of administration to any person at its discretion, or the Court may grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased.

Under the Administrator General's Act, No. III of 1913, section 8, the Administrator-General shall have a right to letters of administration other than letters *pendente lite* in preference to that of (a) a creditor, (b) a legatee other than a universal legatee, or (c) a friend of the deceased. In a High Court he has preference over everybody except the next-of-kin (see sec. 7). Sec. 31 applies only to the grant of certificates to certain persons by the Administrator-General that they are entitled to the assets of small estates valued at less than Rs. 2,000 and sec. 32 empowers the Administrator-General if he does not issue a certificate in respect of these estates to administer them without taking out letters of administration except of those persons who are exempted under that section(t).

Those who stand in equal degree of kindred to the deceased are equally entitled to administration. But in practice the Court takes the following into consideration :—

The Court always prefers a sole administrator to joint administrators, and even where several persons stand in the same degree of kinship it is the rule to select one only, the selection being according to certain recognised principle(u). The interest of the estate and the interest of the parties entitled thereto must be primarily looked to. According to English practice letters of administration may not be granted to more than four persons in respect of the same property (see Phillips Probate Practice, 4th Edn., p. 131). Other things being equal the Court prefers—

(a) Males to females, son to daughter.

(b) A man accustomed to business is preferred to one who is not.

(o) *In the goods of Makhan Lall*, 15 C. W. N. 350.

(p) *Rorburgh v. Lambert*, 2 Hagg. 357, *Williams v. Jukes*, (1864) 34 L. J. P. 60.

(q) *Coombs v. Coombs*, 1 P. & D. 288.

(r) *Ernest v. Eustace*, 1 Deane 273.

(s) (1942) 1 Ch. 453.

(t) *Ram Kati v. Adm.-General*, (1943) All. 740.

(u) *Dinbai v. Motibai*, 43 Bom. L. R. 770.

- (c) Whole blood is preferred to half blood.
- (d) Where none of these tests can be applied the Court frequently appoints the applicant who is first in the field(v).

Letters of Administration of the Estate of Bastards.—Where a bastard dies leaving a widow but no children, under this Act she is entitled to the whole of her husband's property. According to English law she takes one half and the other half goes to the Crown. The widow is, therefore, entitled to administration.

If the bastard dies intestate leaving no relations, letters of administration are ordinarily granted to the Administrator-General. For further particulars as to the distribution of the estate of a bastard see notification dated 31st March 1873, Gazette of India, 5th April 1873, Part IV, p. 334.

Clause (g).

Letters of Administration in case of Foreigners.—If the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although the deceased may have had his domicile in a country in which the law relating to the testate and intestate succession differs from the law of British India.

The grant of administration by a foreign Court or even by a Court in the British dominions outside British India is not sufficient.

Sec. 5 of this Act provides that the succession to the immoveable property in British India shall be regulated by the law of British India in the case of a foreigner. Sec. 19 provides that succession to the moveable property of a person shall be according to the law of domicile of such person. This clause provides that in the case of a person of foreign domicile dying intestate leaving property moveable or immoveable in British India, the grant of letters of administration shall be made to the person according to the order laid down in this section, although foreign law may differ from the law of British India.

220. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Effect of letters
of administration.

[This is sec. 191 of the Succession Act X of 1865 and sec. 14 of the Probate and Administration Act V of 1881. It applies to Hindus, etc.]

This section deals with the point of time from which the title of the administrator as such takes effect(w). This section enacts the doctrine of relation back i.e. on the grant of letters of administration, its effect is as if they were granted at the moment after the death of the intestate. This section only refers to cases of intestacy and not to letters of administration with the will annexed(x).

Doctrine of Relation Back.—In order to prevent injury to the estate of a deceased person, this section enacts that upon the grant being made the title of the administrator relates back to the time of death. In *Ingall v. Moran*(y), an administrator brought an action for damages for a motor car accident to his son who was killed by a military lorry. By the Statute of Limitation the action must be brought within one year from the date of the accident. The action

(v) *Stoney v. Stoney*, 2 Pat. 508 at 512.

(w) *Kulwanta Bewa v. Karam Chand*, (1939) 1 Cal. 21.

(x) *Charu Charan v. Nahaush*, 50 Cal. 49 at p. 57.

(y) (1944) W. N. 17; (1944) 1 K. B. 160.

was filed within one year but letters of administration were granted after one year. It was argued that the letters related back to the date of the accident but that contention was negatived and the action failed. The next section renders valid all the dispositions of the property of the deceased made before the grant when it is shown that such disposition was beneficial to the estate.

Effect of Letters of Administration.—Letters of administration are conclusive of the intestacy of the deceased.

221. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

Acts not vali-
dated by adminis-
tration.

[This is sec. 192 of the Succession Act X of 1865 and sec. 15 of the Probate and Administration Act V of 1881. It applies to Hindus, etc.]

Only such acts as are done by the administrator before grant which are beneficial to the estate will be binding and valid. In this respect an administrator differs from an executor. Sec. 277 enacts that probate when granted renders valid all intermediate acts of the executor. This difference is due to the fact that the administrator derives his title from the Court, whereas the executor's title is derived from the will. If once the grant is made an administrator can exercise all the powers conferred by this section. A defence that the grant of letters of administration was made on misrepresentation as to relationship of the administrator with the intestate is not permissible(z).

What an Administrator may not do before Letters of Administration are granted.

(1) An administrator cannot file a suit before grant, (see *ante*, pp. 375-376). An executor can.

(2) An administrator cannot release an action or release a debt before grant. An executor can (a).

(3) An administrator cannot assign the property of the deceased before grant. An executor can(b).

(4) An administrator cannot surrender a lease(c).

(5) A notice given by an administrator before he has obtained letters of administration is not valid(d).

(6) An administrator cannot effect a valid mortgage before grant(e). But for the purposes of payment of probate duty on the grants, it may be necessary to borrow moneys. In such a case the mortgagee who has advanced moneys to the administrator for the payment of Court fees is entitled to get back his moneys with interest at a reasonable rate and the costs of realization(f).

Probate only to
appointed executor.

222. (1) Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.

(z) *Ambica v. Kala Chandra*, 10 C. W. N. 422.

(a) *Middleton's Case*, 5 Co. 28b.

(b) *Bacon v. Simpson*, 3 M. & W. 178.

(c) *Doe v. Glenn*, 1 A. & E. 49.

(d) *Holland v. King*, 6 C. B. 727.

(e) *Metters v. Brown*, 1 H. & C. 686.

(f) *Baharia Ram v. Bindeshwari*, A. I. R. (1936) Pat. 41; 159 I. C. 342.

Illustrations.

- (i) A wills that C be his executor if B will not. B is appointed executor by implication.
- (ii) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law C, and adds "but should the within-named C be not living I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.
- (iii) A appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—“I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates.” The nephew is appointed an executor by implication.

[Clause (1) is sec. 181 of the Succession Act X of 1865 and sec. 6 of the Probate and Administration Act V of 1881 with the alteration of the word "can" into "shall". Clause (2) is sec. 182 of the Succession Act X of 1865 and sec. 7 of the Probate and Administration Act V of 1881. The word "expressed" is not happy. The corresponding word in the Probate and Administration Act is "express."]

To Whom Probate can be granted.—Probate can only be granted to an executor appointed by the will expressly or according to tenor(g), but an executor cannot be compelled to take out probate. The right of an executor to apply for the probate of the will is personal to the executor and does not survive if he dies without obtaining probate. In *Sarat Chandra v. Nani Mohan(h)* the executor filed a petition for probate and a caveat was filed against the grant and the petition was thereupon converted into suit. Pending the hearing of the suit the executor (petitioner) died and his heir applied for substitution of his name and it was held that the suit abated. The executor of an executor is also not derivative executor in India(i). An executor may renounce probate. But an executor who has intermeddled with the estate of the deceased without obtaining probate shall be compelled to take out probate and if he declines to do so he may be summoned to lodge the will and take out probate(j). A residuary or universal legatee is not entitled to probate, but to letters of administration with the will annexed, and if by mistake probate is granted it is void(k). The Official Trustee is not entitled by virtue of his office and in his character as Official Trustee to obtain a grant of probate(l). The Court of Wards is not a "person" to whom probate or administration can be granted(m). When several executors are appointed, probate may be granted to them all simultaneously or at different times. If two persons are appointed joint executors and one of them applies for probate, the practice of the Bombay High Court is to admit the petition either on the other executor joining in the petition, or renouncing or reserving his right(n).

Probate must be granted to an executor. The Act nowhere provides for any discretion being exercised in the case of an application for probate by an executor. The Court has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit person to be appointed executor(o). Probate cannot be refused to an executor on the ground of his poverty or insolvency, (Halsbury, Vol. 14, p. 140 and p. 167 Hailsham Edn.)

Of what instruments probate may be granted.—Probate can only be granted of instruments which are of a testamentary nature and executed according to the requirements laid down in this Act, and only in respect of property situate

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| (g) <i>Swatantranandji v. Lunidaram</i> , 39 Bom. L. R. 490. | 360; <i>In the goods of Shoshee Bhusan Bannerjee</i> , 19 Cal. 582. |
| (h) 86 Cal. 799. | (i) <i>Grey v. Charustila</i> , 88 Cal. 58. |
| (i) <i>De Souza v. Secretary of State</i> , 12 B. L. R. 423. | (m) <i>Ganjessar Koer, v. The Collector of Patna</i> , 25 Cal. 795; <i>Nrittya Gopal v. Adm.-General</i> , 10 C. W. N. 241. |
| (j) <i>Dayabhai v. Damodar</i> , 20 Bom. 227 varied in 21 Bom. 75. | (n) <i>In the Estate of Arthur Boston Rockley</i> , Petitioner dated 19th September 1925. |
| (k) <i>Pundit Prayag v. Goukaran Pershad</i> , 6 C. W. N. 787; <i>Ex-parte Vittal</i> , 15 Mad. | (o) <i>Hara Coomarr v. Doorgaomni</i> , 21 Cal. 195. |

in British India and containing the appointment of an executor. Probate can be granted of a portion only of the will to the extent to which the contents are proved where other portion is lost(p). If the will is not forthcoming but the codicil is forthcoming it may be admitted to probate(q) (see sec. 225). A paper which neither disposes of property nor appoints an executor, generally speaking, has no testamentary character and no probate thereof can be granted(r). A writing which merely revokes all former wills without making any disposition of its own ought not to be admitted to probate(s); but the Court may grant administration with the writing annexed(t). If a testamentary paper is discovered after the probate is granted to an executor, the executor must bring it into Court for probate even though it be a mere confirmation of the will already proved(u). A will made by a Hindu disposing of ancestral property only, is entitled to probate and the Court is not justified in refusing probate because the testator had no power to dispose of the property(v). It is not the duty of the Court in entertaining a *bona fide* application for probate to consider an issue as to the title of the testator to the property the will deals with or to consider whether the testator had power to dispose it of(w) or whether the testator has left any property or not, [see Administration of Justice Act 1932, 22 and 23 Geo V c. 55 see 2(I)]. The grant does not prejudice the rights of any person who claims any such property(x). An instrument appointing an executor is entitled to probate though the executor may renounce probate(y). The form of the instrument is immaterial, the sole requisites being (1) that it was intended to operate after his death, and (2) that it was executed in accordance with

the statutory requirements. One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is to see whether the paper is revocable(z). A document which is plainly intended to be operative immediately and to be final and irrevocable is a non-testamentary instrument and probate cannot be granted of such an instrument(a).

Of what instruments probate cannot be granted.—A will which simply appoints testamentary guardians ought not to be admitted to probate(b). Also if a will is limited to property in a foreign country, it is not entitled to probate in this country. A writing which is not of a testamentary character is not entitled to probate. If one part of an instrument operates *in proesenti* as a deed and another *in futuro* as a will, probate may be granted of the latter portion(c). Marginal notes and alterations made by the testator in his will which are unattested cannot be admitted to probate(d). Probate may be granted of a part of the will and the other parts omitted if they are not proved to have been prepared under instructions from the testator(e).

Where two instruments are executed on different dates, both should be admitted to probate unless the later revokes the earlier. If both are executed on the same day and it cannot be ascertained which was executed first both should be

- (p) *Kedar Nath v. Sarojini*, 26 Cal. 634.
- (q) *Black v. Jobling*, (1869) L. R. 1 P. & D. 685.
- (r) *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6.
- (s) *In the goods of Fraser*, (1869) L. R. 2 P. & D. 40.
- (t) *In the goods of Hicks*, (1869) L. R. 1 P. & D. 683.
- (u) *Weddall v. Nixon*, 17 Beav. 160.
- (v) *Barot Parshotam v. Bai Mulji*, 18 Bom. 749.
- (w) *Nanku v. Somirun*, 8 C. H. C. R. 287;
- Birj Nath v. Chandar Mohan*, 19 All. 458;
- Hormusji v. Dhanbaiji*, 12 Bom. 164;
- Ochawram v. Dolatram*, 6 Bom. L. R. 966;

- Chintaman v. Ramchandra*, 34 Bom. 589;
- Bai Parvatibai v. Raghunath*, 42 Bom. L. R. 1068.
- (x) *Behary Lall v. Juggo Mohun*, 4 Cal. 1.
- (y) *O'Dwyer v. Geare*, 1 Sw. & Tr. 465.
- (z) *Rajammal v. Authiammal*, 38 Mad. 304.
- (a) *Umrao Singh v. Lachhman Singh*, 13 Bom. L. R. 404 (P. C.).
- (b) *Ganeshji v. Bhagirathi*, 58 All. 832.
- (c) *Chand Mal v. Lachmi*, 22 All. 162.
- (d) *Sardar Nowroji v. Putlibai*, 15 Bom. L. R. 352.
- (e) *Hormasjee K. Sethna v. Dhanjishaw R. Lalcaca*, 12 Bom. L. R. 569.

admitted to probate, if they can stand together, if not neither should be admitted to probate(f).

Probate may be granted of joint wills(g). In case of duplicate wills both parts must be lodged in the testamentary registry but one part is handed back after the grant. (See Tristram and Coote's Probate Practice, 17th Edn. p. 38).

Probate may be granted of a lost will, (see sec. 238). Probate can be granted of a portion of the will if the other portion is lost(h).

Probate may be granted of a nuncupative will(i). Such a will is admitted to probate under the ordinary practice of the Court, and in granting the probate the only question to be considered is whether the will is fabrication or not(j).

If in the will or codicil, the testator refers to any other document it may be incorporated in the will and included in the probate. The document must be an existing document and not one which is to come into existence in future, (see sec. 64). The document must be strictly identified with the description contained in the will. The onus of proving the identity of the document and its existence at the date of the will lies upon the party seeking to establish it.

Who may be appointed Executor.—Any person may be appointed executor.

(1) The King may be constituted executor in which case he appoints such person as he shall think proper to act for him.

(2) A corporation aggregate may be appointed executor in which case they appoint persons styled Syndics to receive *letters of administration* with the will annexed(k). See sec. 14 of the Statute, 15 Geo. 5 ch. 23 (Administration of Estate Act, 1925).

(3) A corporation sole may be appointed executor(l). The Administrator-General is constituted a corporation sole by Act III of 1913, sec. 5.

(4) A partnership firm may be appointed executor and in the absence of anything in the will to the contrary, it is only those members of the firm who were members at the date of the will are entitled to probate unless a contrary intention is expressed therein, (Halsbury, Vol. 14, p. 140 and Hailsham Edition, p. 167). In *In the goods of George Nash(m)*, it was held that when a member of the firm is appointed executor the member who applies for probate must show that he was a member of the firm at the date of the will and at the date of the death of the testator. If a solicitor or a trading firm be appointed executors the appointment only applies to the members of the firm at the date of the will, unless a contrary intention is expressed in the will(n).

(5) An alien is capable of being an executor.

(6) A minor may be appointed executor and even a child *en ventre sa mere*. But probate cannot be granted to a minor, (sec. 223). If the minor is sole executor or sole residuary legatee letters of administration with the will annexed may be granted to the legal guardian of such minor limited during his minority. Probate of the will shall be granted to him after he shall have completed the age of 18 years and not before(o), (sec. 244).

(f) *Townsend v. Moore*, (1905) P. 66.

(g) *In the goods of Piazza-Smyth*, (1897) P. 7.

(h) *Kedar Nath v. Sreemutty Sarojini*, 3 C. W. N. 617.

(i) *Gokul Chand v. Mangal Sen*, 25 All. 313; *In the will of Haji Mahomed Abba*, 24 Bom. 8; *Mariambai v. Hasan*, 1 Bom. L. R. 715.

(j) *Gokuldas v. Purushotamdas*, 1 Bom. L. R. 470.

(k) *In the goods of Darke*, 1 Sw. & Tr. 517.

(l) *In the goods of Haynes*, 3 Curt. 75.

(m) 29 C. W. N. 373; A. I. R. (1925) C. 606.

(n) *In the goods of Fernie*, 6 Notes of Cas. 657.

(o) *Arumilli v. Arumilli*, (1931) 60 M. L. J. 264.

(7) A bankrupt or an insolvent may be executor, and the Court cannot refuse to grant probate to such person on account of his poverty or insolvency, provided that the testator knew that the person was a bankrupt or insolvent when the testator executed the will. If the commission of the act of insolvency was subsequent to the execution, the Court would control the action of such executor by refusing probate or by the appointment of a receiver, (see Mortimer on Probate, p. 284).

(8) A person of unsound mind or *non compos mentis* may be executor, but probate will not be granted to such person. Letters of administration with the will annexed may be granted to his committee limited until he shall become of sound mind, (sec. 246).

(9) A married woman may be appointed executrix and probate can now be granted to her without the previous consent of her husband, (see next section).

(10) The Official Trustee may be appointed executor(*p*). But see the contrary decision of Jenkins, C.J., in *Grey v. Charusila*(*q*), where it was held that the Official Trustee as constituted by Act XVII of 1864 is not entitled by virtue of his office and in his character as Official Trustee to be executor or administrator and as such to obtain a grant of probate.

(11) Appointment of "Panchas" as executors was recognised in *Gulab v. Amin*(*r*).

(12) A shebait may be appointed executor(*s*).

(13) An appointment "that one of the son of A should be executor" is not a valid appointment(*t*).

Of the Appointment of Executors.—The appointment of an executor may be express or implied. Any number of persons may be appointed executors and probates may be granted to all or any of them, reserving the right of others. An executor can derive his office only from a testamentary appointment(*u*). The testator may himself appoint or ask another to appoint an executor(*v*); and probate may be granted to such person(*w*), and the person to whom such power is given may appoint himself executor(*x*). When a testator has omitted to appoint an executor of his will the Court will give effect to such appointment as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor(*y*). The person authorized to nominate may nominate himself.

Sub-Sec. (2).

Executor according to Tenor.—An executor by implication is usually called *executor according to the tenor*. To constitute an executor according to the *tenor* it must appear from the will that the testator intended that he should collect his assets, pay his debts, and generally administer his estate(*z*). He must have a general power to receive and pay what is due to the estate. A direction to pay the testator's debts or funeral expenses out of a *particular fund* and not out of the general estate will not do(*a*), nor a mere bequest of all the property including

(*p*) *In the goods of Manick Lal Seal*, 35 Cal. 156.

(*q*) 38 Cal. 53.

(*r*) 28 Bom. L. R. 529.

(*s*) *Brojo Chunder v. Raj Kumar*, 6 C. W. N. 310.

(*t*) *Parshotam Ram v. Kesho Das*, A. I. R. (1945) L. 3.

(*u*) *Hamabai v. Bamanji*, 7 B. H. C. R. 64, (a. c. j.).

(*v*) *Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 630; *In the goods of Durga Das*, 7 Ind.

Rul. All. 61.

(*w*) *In the goods of Sukhi Sundari Dasi*, 57 All. 235.

(*x*) *In the goods of Ryder*, 2 Sw. & Tr. 127.

(*y*) *In the goods of Courjon*, 25 Cal. 65.

(*z*) *Vitamma v. Seshamma*, 54 Mad. 266; *In the Matter of Radha Monohur Mookerji*, 5 Cal. 756; *Mithibai v. Canji*, 26 Bom. 571; *Thenappa v. Indian Overseas Bank*, A. I. R. (1943) M. 743.

(*a*) *Kuppayammal v. Ammani*, 22 Mad. 345; *Sayaji v. Mutumbat*, 6 Bom. L. R. 78.

the debts of the testator(b). An executor according to the tenor may be appointed for a limited purpose(c) (see sec. 248).

If the testator employs the word "trustee" in a loose sense the person appointed trustee is entitled to probate, but it must be gathered from the will that the person named as trustee is required to pay the debts of the testator and generally to administer his estate. But where it cannot be gathered from the will that the person named as trustee is required to pay the debts and generally to administer his estate, he will not be entitled to probate as executor according to the *tenor*(d) (Halsbury, Vol. 14, p. 138 and Hailsham Edition, p. 162). A mere direction that the person appointed should take care of the property during the minority of the son of the testator will not constitute him an executor according to *tenor*(e).

An executor may be appointed by necessary implication, as where the testator says, "I will that C be my executor, if B will not." In this case B may be admitted, if he please, into the executorship, (ill. i., see also illustrations ii., and iii.). Or, if the testator, supposing his child, his brother, or his kinsmen to be dead, say in his will, "For as much as my child, my brother, etc., is dead, I make A B executor." In this case if the person whom the testator thought dead be alive, he shall be the executor.

When there is an express appointment of an executor, it is less probable that there should be an executor according to the *tenor*(f). But if there is one he will be entitled to probate jointly with an executor expressly nominated(g).

The mere appointment of a universal legatee will not constitute the legatee an executor according to the *tenor* and the practice of the Court is, when there is no executor appointed expressly to grant to the universal legatee, not the probate of the will, but letters of administration with the will annexed(h).

Instituted and Substituted Executors.—A testator may appoint several persons to act as executors; but in law they may be considered in the light of one individual person. Likewise a testator may appoint several persons as executors in *several degrees*; as where he makes his wife executrix, but if she will not, or cannot be executrix, then he makes his son (B) executor; and if his son will not or cannot be executor then he makes his brother (C), and so on. In such a case the wife is said to be *instituted executor* in the first degree, B is said to be *substituted* in the second degree, and C to be substituted in the third degree, and so on. So also a testator may appoint an executor and provide that in case of his death another should be substituted and the latter will be entitled to prove the will on the death of the first, even if the first had proved the will(i). If the instituted executor once accepts the office and afterwards dies intestate the substitutes in what degree soever are all excluded, because the condition of law (if he will not or cannot be executor) was once accomplished by such acceptance of the instituted executor. But where a testator appoints an executor and provides that *in case of his death*, another should be substituted, on the death of the original executor, although he has proved the will, the executor so substituted may be admitted to the office, if it appears to have been the testator's intention that the substitution should take place on the death of the original executor whether happening in the testator's lifetime or afterwards(j). (Williams on Executors, 12th Edn., pp. 143-144).

(b) *Ex-parte Vittal*, 15 Mad. 360.

(c) *Venkatarama v. Sundarambal*, 42 Bom. L. R. 912 at p. 915.

(d) *Appacooty v. Muthu*, 30 Mad. 191; *Harilal v. Bai Mani*, 29 Bom. 351.

(e) *Seshamma v. Chennappa*, 20 Mad. 467;

(f) *Gopal Dass v. Budree Dass*, 33 Cal. 657.

(f) *Gnanamam v. Elnadian*, A. I. R. (1928)

M. 797.

(g) *Powell v. Stratford*, 3 Phillim. 118.

(h) *Ex-parte Vittal*, 15 Mad. 360; *Goods of Shoshee Bhusan Bannerjee*, 19 Cal. 582.

(i) *Mithibai v. Canji*, 26 Bom. 571; *Hormusji v. Dhanbaiji*, 12 Bom. 164.

(j) *In the goods of Lighton*, 1 Hagg 235; *In the goods of Foster*, L. R. 2 P. & D. 304.

Executor for Limited or Particular Purposes.—A person who is appointed executor of the whole will or of all the testator's property or indefinitely is called a general executor. But the testator may limit the appointment and then he is called a special executor. The limitation may be—

(a) As to the time when the executor shall begin to exercise his office, *e.g.*, upon the death or marriage of his son or on the expiration of five years from his death, or,

(b) As to when he shall cease to act, *e.g.*, during the minority of his son or widowhood of his wife, or,

(c) It may be *limited in point of place*, *e.g.*, the testator may make A his executor for his property in Bombay, B for those in Madras, C for those in Calcutta, or,

(d) It may be *limited as to the subject matter*, *e.g.*, a testator may make A his executor for his plate and household stuff, B for his sheep and cattle, C for his leases and estates, D for his debts, or, of his property in India and another of his property abroad.

(e) It may be limited to one part of his property, *e.g.*, his general estate, and other persons as to business.

Co-adjudtors or Overseers.—The testators sometimes nominate persons to assist and advise the executors appointed by them in the discharge of their duties. Such persons are termed co-adjudtors or overseers. The co-adjudtor has no power to administer or to intermeddle with the estate. His function is to watch and advise and if he finds any neglect or miscarriage in the administration by the executors, it is his function to bring it to the notice of the Court(k). In *Sayaji v. Muttumabai*(l) the testator by his will directed that "my wife L shall act according to the advise of S and D;" it was held that L was appointed executor according to the tenor and S and D were merely co-adjudtors, (see Williams on Executors, 12th Edn., p. 142).

Cessor of the Right of Executor to Prove.—The right of an executor to prove the will ceases in the following circumstances :—

(a) If he survives the testator but dies without taking out probate.

(b) If he is cited to take out probate of the will and does not appear to the citation.

(c) If he renounces probate of the will, (sec. 230) but not if his rights are reserved. Probate cannot be refused on the ground that probate has already been granted(m).

223. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Provincial Government in this behalf.

Persons to whom probate cannot be granted.

Originally the section ran as follows :—Probate cannot be granted to any person who is a minor or is of unsound mind, nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband.

(k) *Brojo Chunder v. Raj Kumar*, 6 C. W. N. 310; *The Eastern Mortgage and Agency Ltd. v. Rebat Kumar Roy*, 3 C. L. J. 260. (l) 6 Bom. L. R. 78. (m) *Hara Coomar v. Deorgamoni*, 21 Cal. 195.

This corresponded to sec. 183 of the Succession Act X of 1865 and sec. 8 of the Probate and Administration Act V of 1881. It was amended by Act XVIII of 1927 which provided as follows :—

(2) In section 228 and 236 of the Indian Succession Act, 1925, the words “nor, unless the deceased was a Hindu, Muahmmadan, Buddhist, Sikh, or Jaina or an exempted person to a married woman without the previous consent of her husband” shall be omitted.

Amendment of Sections 228 and 236, Act XXXIX of 1925.

It was again amended by Act No. XVII of 1931 :—An Act further to amend the Indian Succession Act, 1925, for a certain purpose.

WHEREAS it is expedient further to amend the Indian Succession Act, 1925, for the purpose hereinafter appearing : It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Succession (Amendment) Act, 1931.

Amendment of sections 228 and 236, Act XXXIX of 1925. 2. After the word “mind” in sections 228 and 236 of the Indian Succession Act, 1925, the following words shall be added, namely :—

“nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Governor-General in Council in this behalf.”

The words “Provincial Government” were substituted for the words “Governor-General in Council” pursuant to the Government of India (adaptation of Indian Laws) order, 1937.

To whom Probate cannot be granted.—Except the disabilities laid down in this section, the Court will not recognise any other disability on moral or religious grounds, or on the ground of the insolvency of the executor when the testator himself was aware of the financial position of the executor at the time of making the will. If the insolvency is of later date, the Court may appoint a receiver or may act under sec. 301, (see Halsbury, Vol. 14, p. 140, Hailsham Edition p. 167, Mortimer on Probate, 234). The disabilities laid down in this section are minority and insanity.

Similar disabilities are laid down in the case of an administrator under section 236. (1) Probate cannot be granted to an executor who is a minor. Until minority administration with the will annexed may be granted to his guardian limited to the minority(n). On his attaining majority probate may be granted to him, (see sec. 244).

(2) Probate cannot be granted to an executor who is of unsound mind.

(3) Before the Act XVIII of 1927 in the case of Europeans and Parsis probate could not be granted to a married woman executrix without the previous consent of her husband. There was no such restriction for a Hindu or a Mahomedan married woman executrix. This is now done away with and all married women are entitled to probate without the consent of husband.

(4) Probate cannot be granted to an association of individuals, e.g., members of a club or any other body not incorporated as company or corporation which satisfies the rules prescribed by Government. The term “Association” is not defined in Wharton’s Law Lexicon. In Oxford Dictionary it is “a body of persons who have combined to execute a common purpose or advance a common cause”

Rules Relating to Grant of Probate to Companies.—Under the Indian Succession Act (XXXIX of 1925) it was not clear whether probate could be granted to companies. The Indian Succession (Amendment) Act was, therefore, enacted in 1931 for amending the earlier Act so as to make provision authorising the grant of probate and letters of administration to companies on the lines of the provisions prevailing in England. Under the Act as amended probate can be granted to companies which satisfy the conditions prescribed by the rules to be made by the Governor-General in Council in this behalf.

Rules have now been framed by the Governor General in Council in this behalf and they are published at page 40 of Part I of the *Gazette of India* dated 17th January, 1933, Part I page 40. Under the rules three conditions have to be satisfied by a company in order that it may be eligible for the grant of probate or letters of administration. (i) It should be either (a) a company formed and registered under the Indian Companies Acts, or (b) a company constituted under the law of Great Britain and having a place of business in British India. (ii) It should be empowered by its constitution to undertake trust business. (iii) The share capital subscribed should not be less than Rs. 10 lakhs in the case of Indian companies and £100,000 in the case of English companies of which at least one-half should have been paid up in cash. Power is also given to the Governor-General to exempt any company from the last condition, *viz.*, as to share capital.

In exercise of the powers conferred by sections 223 and 236, the Governor-General in Council has framed the following rules :—

1. In these rules—

- (a) "Share capital" includes stock ; and
- (b) "Trust business" means the business of acting as trustee under wills and settlements and as executor and administrator.

2. The conditions to be satisfied by a company in order to render it eligible for the grant of probate or letters of administration under the Indian Succession Act, 1925, shall be the following, namely :—

(1) The company shall be either—

(a) a company formed and registered under the Indian Companies Act, 1918, or under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882, or

(b) a company constituted under the law of the United Kingdom of Great Britain and Northern Ireland or any part thereof, and having a place of business in British India.

(2) The company shall be a company empowered by its constitution to undertake trust business.

(3) The company shall have a share capital for the time being subscribed of not less than—

(a) Rs. 10 lakhs in the case of a company of the description specified in sub-clause (a) of clause (1), and

(b) 100,000 in the case of a company of the description specified in sub-clause (b) of clause (1)

of which at least one-half shall have been paid up in cash.

Provided that the Governor-General in Council may exempt any company from the operation of this clause."

A society registered under the Societies Registration Act XXI of 1860 is not a company under the above notification and is not entitled to the grant of probate under this section, (See Bombay Law Journal, 1941, pp. 299-302).

The High Court of Bombay has by notice issued on 21st November, 1936, notified as follows :—

“In supercession of this office Notice dated the 18th August, 1936. attorneys are hereby informed that the following procedure will be followed in future in connection with petition for grant of Probate or Letters of Administration to Corporation.

A corporation which wants to act as Executor or Administrator should state in the oath to lead the grant that it conforms to the requirements laid down in the rules issued by the Governor-General in Council under sections 223 and 236 of the Indian Succession Act and published in Government of India Notification No. F. 349-32—Judicial, dated the 17-1-1933, specifying the qualifications necessary to render a Corporation eligible for grants of Probate or Administration and shall further depose in what manner the Corporation has been duly authorised to apply for the grant by the person entitled thereto.

The Officer appointed by a Corporation for such purpose shall in every case lodge in the registry a sealed copy of the resolution appointing him. The grant will be to the Corporation direct.”

Grant of probate to several executors simultaneously or at different times.

224. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment and C an executor of it by implication. Probate may be granted to A and C at the same time or to A first and then to C, or to C first and then to A.

[This is sec. 184 of the Succession Act X of 1865 and sec. 9 of the Probate and Administration Act V of 1881.]

Where several executors are appointed they are all entitled to probate. In England the practice is not to grant probate to more than four persons in respect of the same estate, [See Judicature Act, 1925, sec. 160. (1)]. But it is not necessary that they should all apply simultaneously. If all executors do not apply for probate the practice is to grant probate to those who apply reserving the right of the others to come in and prove the same(o). If executors are appointed jointly the practice of the Bombay High Court is to admit the petition either on the other executor joining in the petition or renouncing(p). As a matter of fact, however, probate granted to one of several executors enures for the benefit of all, whether the power is reserved to them or not(q). The grant of probate to some of the executors does not debar the other executors to apply for probate(r). If several minors are appointed executors probate may be granted to them at different times as and when each of them attains majority and applies for probate(s). If the will appoints several executors and directs them to act unanimously or by a majority, and some of them refuse to act as executors, the remaining executors can apply for probate(t).

(o) *Pran Nath v. Jadu Nath*, 20 All. 189.

(p) *In the Estate of Arthar Boston Rockley* Petition dated 16th September 1925.

(q) *Webster v. Spencer*, 3 B. & Ald. 363; *Jekangir v. Kukiha*, 27 Bom. 281.

(r) *Hara Coomar v. Doorgamont*, 21 Cal. 195.

(s) *Hari Chaitanya v. Ram Ram*, A. I. R. (1928) C. 164.

(t) *Hotchand v. Navalrai*, A. I. R. (1930) S. 91.

Rights of Executor who has not applied for Probate.—If the power is reserved to apply for probate then, the practice is to take out what is called a **Double Probate** which is in this manner :—The first executor that comes in takes probate in the usual form with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner and an engrossment of the original will is to be annexed to such probate in the same manner as the first and in the second grant such first grant is to be recited, and so on if there are more that come in afterwards, (Williams on Executors, 12th Edn., pp. 260-261).

If there be several executors appointed with distinct powers, as one for one part of the estate and another for another, yet there be but one will to be proved, one proving of it suffices, *e.g.*, if B is made executor for ten years and afterwards C is to be executor and B proves the will and the ten years expire, C may administer without any further probate, (Williams on Executors, 12th Edn., p. 261). An executor who has not proved the will has the right to call for inventory and account from those who have proved the will(u).

225. (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

Separate probate of codicil discovered after grant of probate.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

[This is sec. 185 of the Succession Act X of 1865 and sec. 10 of the Probate and Administration Act V of 1881.]

When codicil alone entitled to Probate :—There can be no probate of a codicil distinct from the probate of the will. A codicil alone will not be admitted to probate when the will is lost and the terms of the codicil will be incapable of being carried out without knowing what was in the lost will. If the existence of the will is not proved the codicil will not be admitted to probate(v).

Ordinarily a will with all its codicils must be admitted to probate at one and the same time. This section lays down the case of a codicil discovered after the grant of probate. The rule in such a case is to see whether the appointment of executors is in any way affected by the subsequently discovered codicil. If it is not then a separate probate of that codicil will be granted to the executor. But if different executors are appointed by the codicil then the practice is to bring in the probate and the grant will be revoked and a new probate will be granted of the will and codicil together, (see Coote's Probate Practice, 15th Edn., p. 32). Probate of the will and of the newly discovered codicil should not be granted by another Court until the probate granted by the other Court is first revoked. An application to revoke the first grant must be made to the Court which granted it. As a matter of practice codicils should be proved in the Court in which the probate of the will has been obtained(w). The Court will admit to probate a codicil alone if it was independent of the will when the will is proved to have been in existence and is proved to have been lost(x).

226. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

Accrual of representation to surviving executor.

(u) *Jehangir v. Kukibai*, 27 Bom. 281; 5 Bom. L. R. 131.

(v) *Cyril v. D'Altaides*, A. I. R. (1941) R. 33.

(w) *Forbes v. Peterson*, A. I. R. (1941) C. 417 (in appeal) A. I. R. (1942) C. 283.

(x) *In the Goods of Grigg*, 1 F. & D. 72.

[This is sec. 186 of the Succession Act X of 1865 and sec. 11 of the Probate and Administration Act V of 1881.]

Transmissibility of the Office of Executor.—When probate has been granted to several executors and one of them dies, the entire representation of the testator accrues to the surviving executor or executors, and all the powers of the office of executor become vested in the survivors or survivor. Sec. 312 is also to the same effect. If, however, there is only one executor and he dies after proving the will, but before the estate is fully administered, or the last surviving executor dies leaving part of the estate unadministered, his executors or administrators cannot represent the first testator, but a new representative must be appointed for the purpose of administering the part of the estate remaining unadministered, (sec. 258). The practice is to grant letters of administration *de bonis non*, i.e., of goods unadministered with the will annexed to the person who would be entitled to letters of administration to the estate of the original testator under the rules for granting letters of administration hereinafter mentioned, (sec. 259).

In England the rule is otherwise. In the case of the death of a sole executor or the last survivor of several executors, the office devolves upon the *executor* of the sole or last surviving executor; but even in England the office does not devolve upon the *administrator* of an executor. This practice in England is given statutory effect by sec. 7 of the Administration of Estates Act, 1925, (15 Geo. 5, ch. 23) which is as follows :—

(1) An executor of a sole or last surviving executor of a testator is the executor of that testator. This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by—

- (a) an intestacy, or
- (b) the failure of a testator to appoint an executor, or
- (c) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator—

- (a) has the same rights in respect of the real and personal estate of that testator, as the original executor would have if living, and
- (b) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor.

In India according to the decision in *De Souza v. Secretary of State*(y), an executor of an executor is not a derivative executor of the original testator. Marten J., however, in *In re Rustumjee F. Lenten*(z), declined to express any opinion on that authority. Upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a fresh grant of letters of administration. The right does not survive to the heir of the deceased executor(a).

(y) 12 B. L. R. 423.

(z) 22 Bom. L. R. at p. 357.

(a) *Sarat Chandra v. Nani Mohan*, 36 Cal. 799.

But while in India an executor of an executor is not a derivative executor of the original testator, where a residuary legatee who has a beneficial interest obtains letters of administration with the will annexed under sec. 232, but dies before the estate is fully administered, his representative (executor or administrator) has the same right to administration with the will annexed as the residuary legatee had, (sec. 233). Apparently, therefore, if an executor be also a residuary legatee having a beneficial interest, and die testate or intestate before he has fully administered the estate of the original testator, letters of administration with the will annexed may be granted, not to the next-of-kin of the first testator but to the legal representative of the residuary legatee. The legal representative of the residuary legatee is not a derivative executor in the sense in which the term is used in English law, but he must obtain letters of administration *de bonis non* of the first testator. His right merely means that he has the same priority as the deceased residuary legatee.

227. Probate of a will when granted establishes the will
 from the death of the testator, and renders valid
 all intermediate acts of the executor as such.

Effect of probate.

[This is sec. 185 of the Succession Act X of 1865 and sec. 12 of the Probate and Administration Act V of 1881.]

As the executor derives his title under the will on the grant of probate, all his intermediate acts in connection with the estate are validated(b). This section enacts that the vesting takes place on the taking of probate but relates back to the time of testator's death and to the estate which then belonged to him(c). But this does not mean that until probate is taken out there is no will at all. This section is a condensed statement of English law which regards probate as the authenticated evidence of the will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator(d). In this respect an executor differs from an administrator. Under sec. 221 in the case of an administrator only those acts which are beneficial to the estate are validated by the grant.

What the executor may do before Probate.—As an executor derives all his interest from the will before the executor proves the will he may do almost all the acts which are incident to his office except only some of those which relate to suits. He may do the following acts before obtaining probate.

- (1) He may seize and take in his hands the testator's effects.
- (2) He may pay or take releases of debts owing from the estate and may receive debts owing to the estate.
- (3) He may distrain for rent due to the testator.
- (4) He may sell, give away, or dispose of the goods, chattels, and effects of the testator, but the purchaser is not bound to pay his purchase-money until probate has been obtained(e).
- (5) He may execute a conveyance but cannot compel a purchaser to complete until after probate has been obtained. (Halsbury, Vol. 14, p. 145 and Hailsham Edn., pp. 173-174).
- (6) He may assent to or pay legacies.
- (7) He may institute a suit before obtaining probate.

(b) *Meghraj v. Krishna*, 46 All. 286.

(c) *Gopal Lal v. Amulya Kumar*, 59 Cal. 911.

(d) *Mathuradas v. Goruldas*, 10 Bom. 468.

(e) *Newton v. Metropolitan Railway Co.*, 1 Dr. & Sm. 583.

(8) He can compromise an action. (Halsbury's Laws of England Vol. 14, p. 115).

(9) An executor can be a petitioning creditor in insolvency proceedings, but he must obtain probate before an adjudication order is made(f).

(10) An executor of a creditor of a company may present a winding up petition under the Companies Act before he has obtained probate, but he must obtain probate before the hearing of the petition(g).

(11) If an executor has elected to administer the estate, he may be sued before probate and cannot afterwards renounce, (Halsbury, Vol. 14, p. 175).

If an executor die before probate is obtained any of these acts done without proving the will stand firm and good. (Williams on Executors, 12th Edn., pp. 187-194).

Effect of Grant.

(a) Probate and letters of administration with a copy of the will annexed are conclusive evidence of the testamentary capacity of the testator as to the *factum* and validity of the will(h), and the finding of the Probate Court as to the due execution of the will is conclusive(i).

(b) Probate is conclusive as to the genuineness of the will and appointment of executors(j). It is not conclusive as to the domicile of the deceased, although such question may have arisen in the probate proceedings(k). A will is either good or bad against the whole world(l).

(c) Once probate is granted no suit will lie for a declaration that the testator was not of sound mind(m).

(d) The grant of probate of a Mahomedan will is an authentication as to the title of the executor by virtue of which the property of the testator vests in him(n). But the grant does not preclude the civil Court from making a declaration that one or more provisions of the will are inoperative as opposed to Mahomedan law(o).

(e) Probate is conclusive as to the representative title of the executor against the debtors of the deceased and gives complete indemnity to them, (sec. 273).

The grant of probate is not conclusive against all the world in regard to the following :—

(a) It is not conclusive as to any collateral matter. It is not *prima facie* evidence of the death of the testator(p).

(b) It is not conclusive as to the right of the testator to dispose of the property concerned, (Halsbury Vol. 34 p. 161).

(c) In *Kalyanchand v. Sitabai*(q), it was held that sec. 41 of the Evidence Act was not applicable to the judgment of Probate Court which declared that the will was made when the testator was not of sound mind.

(f) *Ex-parte Paddy*, 3 Madd. 241; *Rogers v. James*, 7 Taunt. 147.

(g) *Re Masonic & General Life Assurance Co.*, 32 C. D. 373.

(h) *Whicker v. Hume*, 7 H. L. C. 124; *Charu Chandra v. Pahush Chandra*, 50 Cal. 49 at p. 57; *K. M. S. Chettyar v. Kulsum Bibi*, A. I. R. (1936) R. 108.

(i) *Chandreshwar v. Bisheshwar*, 5 Pat. 777.

(j) *Griffiths v. Hamilton*, 12 Ves. 298; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792; *Raghu Nath v. Musst. Patē Koer*, 6 C. W. N. 345; *Nishi Kanta v. Ashu Tosh*, 17 C. W. N. 613; *Birj Nath v. Chandar*

Mohan, 19 All. 458; *Chintaman v. Ramchandra*, 34 Bom. 589; *Hormusji v. Bai Dhumbaiji*, 12 Bom. 164.

(k) *Concha v. Concha*, 11 A. C. 541.

(l) *Srimati Bahuria v. Srimati Amarba Kuar*, 22 Pat. 289, following *Birch v. Birch*, (1902) P. 130.

(m) *Allen v. Dundas*, 3 T. R. 125; *Allen v. McPherson*, 1 H. L. C. 191.

(n) *Shaikh Moosa v. Shaikh Essa*, 8 Bom. 241.

(o) *Mohamed v. Srimati*, 23 C. W. N. 658.

(p) *K. M. S. Chettyar v. Kulsum Bibi*, A. I. R. (1936) R. 108.

(q) 16 Bom. L. R. 5 (F. B.).

(d) It may be shown that the grant was revoked or that it was forged or that it was granted by a Court that had no jurisdiction.

(e) If the grant is refused by a competent Probate Court the refusal does not necessarily amount that the will is not genuine(r).

(f) If the grant is made in common form, it may be shown that the will is a forgery(s). But if probate is granted in solemn form, it is conclusive evidence of the validity and contents of the will. As to the conclusiveness of probate and letters of administration see further commentary under sec. 273 (Halsbury, Vol. 14, p. 213 and Hailsham Edn., p. 282).

Functions of the Probate Court.

The function of the Probate Court is to determine what documents are testamentary and who is entitled to be constituted the legal representative of the deceased, (Coote's Probate Practice, 17th Edn., p. 5). Its primary function is to deal with the factum and the due execution of the will. It has no jurisdiction to go into the question of the validity of the provisions of the will according to Hindu law(t). It has no concern with the intention of the testator(u). In England the Probate Division exercises those functions where there is a division of Courts, viz., the Court of Probate and the Court of construction, In India also the Courts of Probate and Courts of constructions are distinct. In the Presidency Towns the Chartered High Courts exercise two jurisdictions (a) testamentary and intestate jurisdiction under which it grants probates and letters of administration and (b) original civil jurisdiction under which it acts as a Court of Construction. The Probate Court's jurisdiction is confined to deciding whether the instrument is testamentary and entitled to probate and the appointment of executor. It is no part of the function of the Probate Court to construe the will, except only for the purpose of ascertaining the appointment of executor, and the Court of Construction will accept the decision of the Court of Probate as to the validity of the execution of the will and the appointment of executors. The grant of probate is conclusive evidence of the factum of a will and is conclusive as to the issues directly involved in the probate proceedings, namely, the validity of the will and the appointment of the executors(v). If the relationship of the caveator is a question directly and substantially in issue in such proceedings, no separate suit in any civil court will lie by the same person for the determination of the same issue. In *Sheoparsan v. Ramnandan*(w) on an application for probate a caveat was filed by P alleging to be the next reversioner of the testator's widow and the proceedings were converted into suit. The Court held that the will was proved and that P was not the person entitled to oppose the grant. P afterwards filed a suit under sec. 42 of the Specific Relief Act for a declaration that he was the next reversioner but the suit was dismissed. A probate granted by the Probate Court cannot be impeached in a Court of Construction even on the ground of fraud. Proceedings to revoke the grant must be taken in the Probate Court.

It is not the function of the Probate Court which has granted probate to decide questions of title or to interpret the true meaning of the will. These matters are to be decided in a regular suit(x). The Probate Court will not go into the question whether the property disposed of by the will was joint ancestral property or self acquired property of the testator(y). The only thing that the Probate Court has got to see is that the person applying for grant is entitled to represent the

(r) *Ganesh v. Ramchandra*, 21 Bom. 563.

(s) *Pristman v. Thomas*, (1884) 9 P. D. 210.

(t) *Mt. Laso Devi v. Mt. Jagatambha*, A. I. R. (1936) L. 378.

(u) *Nagendra v. Mohendrahari*, 34 C. W. N. 989.

(v) *Chintaman v. Ramchandra*, 34 Bom. 589.

(w) 20 C. W. N. 738 (P. C.).

(x) *In the Estate of Alice Skinner*, 58 All. 22.

(y) *Raghunath v. Musst. Pate Koer*, 6 C. W. N. 345; *Janki v. Rambahadur*, 163, I. C. 656.

estate of the deceased(z). A contest for probate is a suit to try the question of testacy or intestacy; but administration is a matter of civil right and falls within the jurisdiction of the Court of Construction(a). The question in probate proceedings is whether one or other of the parties to the proceedings is entitled to represent the estate. When the proceedings are contested the Court has to try one issue between the parties and which involves the question whether the plaintiff is entitled to have a grant of probate or whether the person who has entered a caveat and who has become a defendant has substantiated and proved the defence he has set up(b). The construction of a will is not the function of the Probate Court. But for the purpose of grant, the Probate Court should not shirk the question of construction(c). It may construe it for determining whether the document is a will and whether the person applying is entitled to probate(d).

According to sec. 41 of the Indian Evidence Act the grant operates as a judgment *in rem* and can only be set aside on the ground of fraud or want of jurisdiction. In *Messa v. Messa*(e) the lower Court held that the judgment of Alexandria Court (a foreign court) holding that the will of the deceased was void and granting letters of administration, being a judgment which affected the status of executors and conferring on the plaintiff the status of an administrator was a judgment *in rem*; but the Appeal Court did not accept that view. The expression "competent Court" used in sec. 41 was not confined to the Courts in British India but meant the Court of any country which was competent to pass such judgment referred to in that section. No Court can pronounce a judgment *in rem* binding outside the state in which the Court exercises jurisdiction unless such judgment affects either a thing situate or a person domiciled within such state. The judgment of a foreign Court can only operate *in rem* where such Court gives a judgment affecting the status of a person domiciled within its territory; but where a person domiciled in one country dies leaving assets in another country, the Courts of the latter country can only appoint a representative of the deceased in that country and to distribute the assets in that country according to the law of succession of the country of domicile.

With regard to judgment of Probate Courts in British India, such judgments will operate as judgments *in rem* only in respect of the following issues: (1) as to the due execution and attestation of the will, and (2) as to the appointment of executor(f). When the application for probate is refused on merits *e.g.* that the testator was not of sound mind and the will is invalid, the judgment will operate as *res judicata* and the executors will be precluded from setting up the will as a defence to a suit brought against them by the heir to recover possession of the property from them(g). In *Bhagwandas v. D. D. Patel & Co.*(h). Blackwell J., held that by reason of sec. 44 of the Evidence Act the law in India was different from that in England; that in India a decree *in rem* is relevant under sec. 41 of the Evidence Act and can be contested on the ground of fraud or collusion which does not go to the jurisdiction of the Court. His Lordship also observed that "it is also clear that having regard to sec. 44 of the Evidence Act it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside but that he may show in the suit or proceedings in which it is set up against him that it was obtained by fraud." His Lordship accordingly held that in India as in

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| (z) <i>Parvatibai v. Raghunath</i> , 42 Bom. L. R. 1063; A. I. R. (1941) B. 60. | (d) <i>Nand Kishore v. Pashupati</i> , 7 Pat. 396; <i>Arnumoye v. Mohendra</i> , 20 Cal. 888. |
| (a) <i>In the goods of John Shelton, Ind. Decision Old Series</i> Vol. 586 at p. 590 | (e) 40 Bom. L. R. 571; <i>Menahem v. Moses</i> , (1938) Bom. 529. |
| (b) <i>Pran Kumar Pal v. Parphari Pal</i> , 54 Cal. 126; <i>Maragatammal v. Yesodammal</i> , (1941) M. 49. | (f) <i>Ameerchand v. Mohammed</i> , 6 C. L. J. 453. |
| (c) <i>In re Fawcett</i> , (1941) W. N. 152; (1941) P. 85. | (g) <i>Kalyan Chand v. Sitabai</i> , 38 Bom. 309 (F. B.) |
| | (h) A. I. R. (1940) B 131. |

England it is open to the party to show that the will is a forgery and that it is open to him to show that probate was obtained by fraud. These observations are obiter and Chatterji J., in *Raj Kishore v. Promoda Behari*(i) has observed that the case cannot be regarded as an authority on the question of the applicability of sec. 44 of the Evidence Act and held that probate can only be revoked by a Court which granted it, that a grant of probate is not a decree and sec. 44 of the Evidence Act has no application. Incidentally the Probate Court may decide the right of the caveator to oppose the grant. A caveat can only be entered by a person having an interest in the estate of the deceased either under the will or by inheritance(j), and if that issue is determined by the Probate Court as laid down in the above Privy Council case no separate suit will lie. But matters which are not directly and substantially in issue but are merely collateral to the subject are not *res judicata*. Moreover, the parties must be the same or the persons claiming through them. In *Mirza Kurratulain v. Peara Sahib*(k) the will contained confirmation of some transaction between the testatrix and caveator and a release was executed. The caveat was dismissed and probate granted. In subsequent proceedings it was held that the caveator was not estopped by probate or by the probate proceedings from denying the validity of the confirmation and release. A decision of the Probate Court only operates as an *estoppel in rem* in so far as it decides that the person is not entitled to the grant, but it does not decide whether the person is entitled to the property by inheritance(l).

But Probate Court should not as a rule construe the will(m). The Construction of a will is not the function of the Probate Court. Probate Court should not decide who are the persons beneficially interested in the estate(n). It is also not the function of the Probate Court to decide questions of title of the property. A caveat cannot be entered on the mere ground that the property in respect of which letters of administration are asked for is joint family property(o).

It is also not competent for the Probate Court to determine whether the testator has or has not the power to dispose of the property which he purports to dispose of by his will(p). It is also not the function of the testamentary judge to go into the question of the validity of the provisions of the will(q). In the case of the will of a Mahomedan the Court of Probate has no jurisdiction to determine whether the testator was a Mahomedan or a Christian and as to what is the position of the executor with regard to the excess over one-third of the property(r).

228. When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and a properly authenticated copy of the will is produced,

Administration, with copy annexed, of authenticated copy of will proved abroad.

letters of administration may be granted with a copy of such copy annexed.

(i) 22 Pat. 756.

(j) *Swatantranandji v. Lunidaram*, 39 Bom. L. R. 490.

(k) 32 I. A. 244.

(l) *Lalit Mohan v. Radharaman*, 15 C. W. N. 1021 at 1027.

(m) *Nandkishore v. Pasupati*, 7 Pat. 369.

(n) *Abdul Gafur v. Jayarabi*, 31 Bom. L. R. 1098.

(o) *Nishi Kanta v. Ashu Tosh*, 17 C. W. N. 613; *Hormusji v. Dhanbaiji*, 12 Bom. 167; *Ochavaram v. Dolatram*, 28 Bom. 644; followed in *Parvalibai v. Raghunath*,

42 Bom. L. R. 1063; *Ramchandra v. Ramabai*, 39 Bom. L. R. 165 at 170; *Sudhir Chandra v. Uttara*, A. I. R. (1933) Cal. 571; *In re Dhuramsi Morarji*, 14 Bom. L. R. 1081 not followed.

(p) *Barot Parshotam v. Bai Muli*, 18 Bom. 749; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792; *Chintaman v. Ramchandra*, 34 Bom. 589.

(q) *Mt. Laso Devi v. Mt. Jagtambha*, A. I. R. (1936) L. 378.

(r) *Abdul Rashid v. Minhazal*, A. I. R. (1938) N. 173; 175 I. C. 897.

[This is sec. 180 of the Succession Act X of 1865 with the following alteration, viz., the words "whether in the British dominions or in a foreign country" are changed into "whether within or beyond the limits of His Majesty's dominions." Corresponding sec. of the Probate and Administration Act V of 1881 is sec. 5.]

Under sec. 273 probate has the effect on all the properties of the testator situate in the province in which it is granted. The jurisdiction of the District Judge in granting probate only extends over all the properties situate within his province. Only the High Court can grant probate having effect throughout the whole of British India.

This section lays down the rule of procedure :—

(1) When such property is situate within British India but in two different Provinces.

(2) When such property is situate partly in British India and partly abroad.

In case (1) the procedure is simple. If the will is deposited in a competent Court and a petition for probate is made to that Court and probate granted, limited to the property situate within that Province, then with respect to the properties situate in another Province, the applicant should obtain a certified copy of the will from the first Court and lodge it in the other Court and make an application for probate to the District Judge in whose jurisdiction such other property is situate, whereupon that District Judge will proceed to entertain the petition and if satisfied letters of administration with a copy of such certified copy annexed will be granted. The same procedure applies when the property is situate in India but not under British jurisdiction but under foreign jurisdiction, e.g., in Goa or Chandranagore. In *Sushilabala v. Anukul(s)*, a copy authenticated by the notarial seal was accepted as a properly authenticated copy of the will. Such copy may be lodged in the District Court where the property is situate whereupon letters of administration will issue. In the same case it was also held that the will need not remain deposited for ever. If it is once deposited and thereafter withdrawn, that would be sufficient. The expression "proved and deposited" used in this section must be interpreted according to the English practice. The word "proved" is not necessarily equivalent of "admitted to probate" but is intended to mean authoritatively established as being valid according to the law of the place where it was made(t).

Probate of Foreign Wills.—When some property is situate beyond the limits of British India and some in British India, if the will dealing with the foreign properties is proved abroad, an authenticated copy of the will must be produced and application for grant of letters of administration with a copy of such authenticated copy of the will annexed should be made to the District Judge in whose jurisdiction such property is situate, whereupon if the application is proper the grant will issue. It is not the function of the Court in British India to require evidence of the validity of the will if it is recognised as valid by the Court of domicile of the testator, (Mortimer on Probate, p. 25). It is not necessary that the will should be first proved in the Court of domicile of the testator. If it is valid according to the law of domicile and if there are assets in British India, the Court should issue the grant under this section(u). It is not necessary under this sec. that the petition should be filed by the executor himself. It is not the intention of the legislature to compel the executor living abroad to come to this country to take out the letters of administration personally when he has obtained probate of the will in his own country. This section also does not require the furnishing of any security(v).

N. 883 (P. G.).

(v) *See in Willford, Hazell Selby A. I. R. (1940)*

This sec. stands by itself and is not to be governed by sec. 276 or sec. 278. The grant made under this section is not of the character of the grant mentioned in section 276 or sec. 278. It does not intend to establish either the will or the representative character of the applicant. It is an ancillary grant in order to give effect to the grant already made. It is not a grant in the sense mentioned in sec. 276 viz. that it is a grant of administration with the will annexed and according to the practice prevailing in the Bombay High Court an applicant under this section is not required to state the particulars mentioned in sec. 276 or 278. The application is also not required to be verified under sec. 281 and no bond is required from the applicant or give security, or to file an inventory and account under sec. 317(w).

The method relating to the grant of foreign wills is only contained in sec. 228 and it was based on the English practice prevailing at the time when the Act of 1865 was passed. The English practice, as laid down in Mortimer on Probate is as follows :—When the will has been adopted as a valid testament by the Court of the country of domicile, the same should be accepted by the British Court without any further proof. In certain old cases it was laid down, that the English Courts required further proof of the will, but that practice is not adopted. According to the recent practice prevailing in England, the Courts admit to probate the will of a domiciled foreigner, if an authenticated copy and satisfactory evidence of the same having been recognised by the foreign Court is produced. But the oath must be filed leading to the grant and the oath must contain a statement as to the domicile of the deceased, and as to the method in which the will was proved in a foreign Court. This is the practice adopted when the executors apply for the grant of probate.

When the executor himself does not apply, but somebody else applies for letters of administration with the will annexed, then according to the English practice as laid down in Mortimer on Probate, it is not necessary “to clear off” (as the expression is used) the executors, and that is the practice adopted by the Bombay High Court. The proof of will required under sec. 228 is quite different from the proof of will, when it is to be proved under sec. 276. That seems to be the practice adopted in England and that seems to be the practice followed in India(x).

The real object of this section is to dispense with the production of the original will owing to its having been deposited in some other Court. The section is an enabling section. If the Court in this country considers that there is a question to be decided relating to the validity of the will the Court is bound to try that question before enabling the executor to act under the will in this country(y).

If the foreign will is not proved the procedure that the Courts in British India adopt on receipt of the authenticated copy of the will is as follows :—The Court will take evidence as to the due execution of the will according to the law of the country in which the testator was domiciled and in case of moveable property the Court must satisfy by evidence as to the law relating to the execution of wills in force in such country(z).

The word “may” used in this section gives a discretion ; the grant of letters of administration under this section will not be made as a matter of course by the Probate Court on the mere production of an authentic copy of the will, but the Probate Court will exercise its own judgment and discretion(a).

(w) *Deputy Commissioner v. Jagdish*, 2 Pat. L. J. 683.

(x) *Sushilabala v. Anukul*, 22 C. W. N. 713 ; *Soona Moyna v. Soona Navena*, 20 C. W. N. 833.

(y) *Ram Lal v. Charan Das*, (1938) Lah. 562 ;

A. I. R. (1938) L. 349 ; 172 I. C. 224.

(z) *Bhaurao v. Lakshminabai*, 20 Bom. 607 at 610.

(a) *In the goods of Goshalkar*, (1866) L. R. 1 P. & D. 183 ; *In the goods of Weather*, 86 L. J. P. & M. 41.

This section has no application if a testator has made two independent wills, one disposing of his property in this country and the other disposing of his property abroad. In such a case the former alone should be admitted to probate here in the ordinary way(b).

Exemplification.—The “properly authenticated copy of the will” referred to under this section is called exemplification. For form of exemplification see Coote’s Probate Practice. This section speaks only of letters of administration but probate may also be granted(c). Probate will be granted on two grounds:—*first* that the will has been adopted as a valid testament by the Court of the country of domicile and *secondly* on proof that the will is valid by the law of the country in which the testator was domiciled at the time of his death, (Mortimer on Probate, p. 485.)

Evidence.—The law of the country will be proved by an expert in that law. The certificate of an ambassador of the country in question is sufficient.

The Colonial Probates Act, (1892) 55 Vict. c. 6, and the practice therein indicated, *viz.*, to send an exemplification of the probate granted in any part of the United Kingdom to be resealed by the Court to which it is sent has not been extended to British India. Here the practice is to require letters of administration with the will annexed to the estate of a British subject leaving property in India(d).

Procedure.—Ordinarily such applications are made by a duly constituted attorney in India under a power of attorney executed in accordance with sec. 85 of the Evidence Act(e).

229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship :

Grant of administration where executor has not renounced.

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

[This is sec. 193 of the Succession Act X of 1865 and sec 16 of the Probate and Administration Act V of 1881.]

Of Acceptance and Renunciation of the Office of Executor.—An executor cannot be compelled to accept executorship. He may act as executor or he may refuse to act. There is no provision in the Act fixing a time limit for an executor within which he must make up his mind. An executor can apply for probate at any time(f). In order that administration of the estate may not hang up for an indefinite time this section affords a remedy to the beneficiary. Under this section a beneficiary may call upon by serving a citation on the executor to make up his mind whether he would act as executor or not within the time mentioned in the citation. The time allowed to the executor to make up his mind is in the discretion of the Court(g). If on the citation the executor appears and expresses his wish to act as executor then he is required to apply for probate within the time fixed by the

(b) *In the goods of Coope*, (1876) L. R. 1 P. & D. 449; *In the goods of Astor*, (1876) 1 P. D. 150; *In the goods of Murray*, (1896) P. 65.

(c) *In the goods of Primrose*, 16 Cal. 776.

(d) *In the goods of William Rennie*, 40 Cal. 74.

(e) *In the goods of Primrose*, 16 Cal. 776.

(f) *Saibala v. Baidya Nath*, 32 C. W. N. 729.

(g) *Kavaji v. Bai Dinbai*, 40 Bom. 666.

Court(h). If he appears and declines to act or does not appear, he is debarred for ever from applying for probate under sec. 230 and the Court will issue order for the grant of letters of administration with the will annexed to the person next entitled to the grant, (sec. 231). A legatee cannot obtain representation without giving an opportunity to the executor to apply or renounce(i).

Disputes as to the validity of the Will :—The Calcutta High Court in *Sarojini Dasi v. Rajlukshmi Dasi*(j) observed that unless and until the validity of the will is established the executor is not bound to accept or renounce his executorship. He could not be compelled to say whether he would accept or renounce the executorship until the will was established. But once the will is established the executor is bound to accept or renounce his executorship. In *Venkataramier v. Govindarayalier* (k) there were several executors appointed by the will. The will was propounded by one of the executors and disputed by another and the Court held that an executor may challenge the genuineness of a will and at the same time claim probate if the will was found to be genuine. The same question arose in *Inre Lakshmi Shanker* (l), and the following question was referred to the Full Bench. "Is it implied by sections 229 and 230 that an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under sec. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person, and the Court after reviewing the above cases answered the questions in affirmative.

In some cases the executor will be compelled to apply for probate by the Court, e.g., when he has intermeddled with the estate of the testator. This is according to the English practice. In *Brojolar v. Sharajubala*(m) this practice was not approved of as it had grown up under different conditions and is regulated by different statutes.

Acts which constitute intermeddling with the Estate are—taking possession of the estate of the testator, or selling same or recovering or releasing debts due to the testator(n), acts which show an intention to take upon himself the office of executor; but an executor may look into the testator's books with a view to determine whether he shall accept the office or not, without rendering himself liable to take probate. (Halsbury Vol. 14, p. 170.)

Acts which do not amount to Acceptance.—Mere performance of acts of charity or of necessity such as giving directions for funeral or placing goods of the deceased in a place of safety or locking them up or making an inventory, do not constitute an acceptance of office, (Halsbury, Vol. 14, pp. 178-179.)

What is citation.—When a person having the superior right to prove a will or take administration delays or declines to do so, the Court, at the instance of a person having an inferior right, cites the person having the superior right to take the required grant and on his failing to do so decrees it to the other.

Citation is a summons calling upon a party to do something or to see something. Citations are issued for the following four purposes: (a) to produce will, (b) to see proceedings, (c) to bring in probate when improperly granted and (d) to bring in letters of administration when improperly granted. In English practice there are two kinds of citations (a) citation to propound and prove a will and (b) citation to take probate. Under this Act there is no such distinction(o). Under

(h) *Motibai v. Karsandas*, 19 Bom. 123.

(i) *Nigendra v. Mohendrahari*, 34 C. W. N. 939.

(j) 47 Cal. 838 at pp. 841-842.

(k) A. I. R. (1926) M. 605.

(l) A. I. R. (1941) Oudh 293 (F. B.).

(m) 51 Cal. 745 at p. 758.

(n) *Long v. Symes*, 3 Hagg. 771.

(o) *Re B. Lakshmi Shanker*, A. I. R. (1941) Oudh 293 (F. B.).

this Act there are two kinds of citation : (a) compulsory or special citation and (b) discretionary or general citation. Citation under this section is compulsory or special(p). If the grant of letters of administration is made without citation to the executor under this section, it will be revoked under sec. 263(g). Sec. 235 is another instance of compulsory citation. An executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time. If he does not, letters of administration with the will annexed may be granted to any competent applicant(r). A case of a discretionary citation is to be found in sec. 283 which says that it shall be lawful for the Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

Form of Citation.—Whereas it appears by the petition of A.B. of filed in this Court on the day of that C.D. late of deceased died on the day of having made and duly executed his last will bearing date and therein appointed you sole executor and whereas it further appears by the said petition that the said A.B. is a legatee named therein.

You are hereby summoned to appear in this Court in person or by pleader within days from the date of service hereof on you, and accept or refuse the probate and execution of the said will or show cause why the same should not be granted to the said A.B. And take notice that in default of your appearing this Court will proceed to grant administration of the estate of the said deceased to the said A. B. in your absence.

Proviso.

The only exception for dispensing with the citation is in one case, *viz.*, where the will is proved by one or more executors leaving the right of the other executors to prove or not to prove and if all the proving executors die, a discretion is given to the Court to grant letters of administration without citing those who have not proved. There is no provision in the Act for the issue of a citation to an executor on an application for probate by another executor. This section only applies on an application for letters of administration.

230. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

Form and effect
of renunciation of
executorship.

[This is sec. 194 of the Succession Act X of 1865 and sec. 17 of the Probate and Administration Act V of 1881.]

Renunciation is the act whereby a person having a superior interest or right to probate or administration waives and abandons it. This section only provides for renunciation by an executor. There is no provision in the Act for renunciation by an administrator, but the same principles apply in the case of a renunciation by an administrator(s).

How Renunciation may be made.—Renunciation may be made in two ways.

(1) Orally in the presence of the Judge, *i.e.*, in open Court(t).

(p) *Sarojini v. Rajlakshmi*, 47 Cal. 888,

(q) *Hormusji v. Dhanbaiji*, 12 Bom. 164 ;

(r) *Sarojini v. Rajlakshmi*, 47 Cal. 888,

(t) *Mombai v. Karsandas*, 19 Bom. 123 ;

Karasji v. Bai Dinbai, 40 Bom. 666.

(s) *In re Manchershia Pestonji*, 53 Bom. 172.

(t) *Venkataramier v. Govindarajaliar*, A. I. R. (1926) M. 605.

- (2) By a writing signed by the person renouncing. It is not necessary that the renunciation should be filed in Court. It is enough if there is a written renunciation and is proved to the satisfaction of the Court(*u*). The writing need not be addressed to the Court. All that is required is that the writing must be signed by the executor(*v*).

Renunciation must be made absolutely and without reserve. Non appearance to a citation is equivalent to renunciation(*w*).

An executor who has once accepted executorship cannot afterwards renounce(*x*)

Form of Renunciation.—Whereas A.B. late of deceased died on the day of at having made and executed his last will bearing date the day of and thereof appointed me the undersigned C. D. sole executor.

Now I the said C. D. do hereby declare that I have not intermeddled in the property and credits of the said deceased, and will not hereafter intermeddle therein and I do hereby renounce all my right and title to the probate and execution of the said will.

Signed by C. D. }
in the presence of } Sd. C. D.

Effect of Renunciation.—When a person renounces probate his right in respect of the executorship wholly ceases. He is not allowed even to take representation to the testator in another character, except by permission of the Court, (Bombay High Court Rule 639). In *Sailbala v. Baidya Nath*(*y*), one of the executors did not join in the application for probate and disputed the genuineness of the will. Probate was ordered to be granted. He then applied to be joined as executor and it was held that he had not renounced and was permitted to join.

Renunciation by Administrator:—Sec. 229 mentions only executor who can be called upon to renounce. There is no section under this Act requiring an administrator to renounce.

Retraction of Renunciation.—In England retraction of renunciation is permissible before it is filed, (Coote's Probate Practice, 16th Edn., 278, and Halsbury, Vol. 14, p. 144, Hailsham Edn., p. 178). Under this section a renunciation by an executor precludes him from retracting it(*z*). The Bombay High Court has held that retraction of renunciation by a person having a prior right to the grant in letters of administration may be allowed in a fit and proper case. But mere change of mind is no ground for such retraction(*a*). The Calcutta High Court in *In the goods of Srimati Golap*(*b*), expressed the same opinion that in a fit and proper case the English practice of allowing an executor to retract renunciation may be followed, although they held in that case that it was not a fit case, but that decision was not followed in *Hari Ram v. Ram Ram*(*c*), and in *Brojo Lal v. Sharajubala*(*d*), where it was held that an executor having once renounced executorship should not be permitted to retract, and that the English practice need not be followed in India. But in *In the goods of Manick Lal Seal* (*e*), it was held that when no formal renunciation is made, the applicant was not precluded from applying for probate.

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| (u) <i>Gnanamani v. Esunadian</i> , A. I. R. (1928) M. 797. | (z) <i>Brojo Lal v. Sharajubala</i> , 51 Cal. 745. |
| (v) <i>Gadodia v. Raghubar</i> , A. I. R. (1931) L. 746. | (a) <i>In re Manchershah Damania</i> , 30 Bom. L. R. 1566; 58 Bom. 172. |
| (w) <i>Motibai v. Karsondas</i> , 19 Bom. 123. | (b) 5 C. W. N. c. 1. v. |
| (x) <i>Ayshabai v. Ebrahim</i> , 32 Bom. 364. | (c) 27 C. W. N. 285. |
| (y) 32 C. W. N. 729. | (d) 51 Cal. 745. |
| | (e) 35 Cal. 156. |

231. If an executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

Procedure where executor renounces or fails to accept within time limited.

[This is sec. 195 of the Succession Act X of 1865 and sec. 18 of the Probate and Administration Act V of 1881.]

No time is fixed for renouncing; but if the executor after being cited does not make appearance within the time mentioned in the citation it will amount to renunciation and the Court will grant letters of administration with the will annexed to the person entitled to administration. In *Motibai v. Karsondas*(f), the executrix after being cited declined to prove the will but stated that she was administering the estate and that there was no necessity to take out probate and that she had obtained a succession certificate. The residuary legatee under the will applied for letters of administration with the will annexed and the same were granted. In *Kavasji v. Bai Dinbai*(g), it was held that an executor called upon by citation to accept or renounce is compellable if he accepts to take out probate within a limited time. If he does not do so letters of administration with copy of the will annexed may be granted to any competent applicant.

Grant of administration to universal or residuary legatees.

232. When—

- (a) the deceased has made a will, but has not appointed an executor, or
- (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or
- (c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

[This is sec. 196 of the Succession Act X of 1865 and sec. 19 of the Probate and Administration Act V of 1881.]

Grant of Letters of Administration with Will annexed or grant “cum Testamento Annexo.”

Administration with the will annexed is granted in cases where a person dies testate without having appointed an executor or where the appointment fails. The appointment fails—

(1) If the executor appointed has died in the testator's lifetime or after his death without proving the will. In *Edward W. Coleston v. Mrs. Theresa Chitty*(h).

(f) 19 Bom. 123.
(g) 40 Bom. 666.

(h) 7 Ind. Rul. All. 261.

the executor named in the will after applying for probate died pending the grant. In such a case the proper procedure is to proceed under this section and to grant the letters of administration with the will annexed to the person entitled thereto. The Calcutta High Court has held that a right to grant letters of administration with the will annexed was a personal right derived from the Court and if the residuary legatee applied for such a grant but died pending the issue of the grant his heir can be substituted in his place(i); but this decision was not followed by the Patna High Court(j). In *Sarat Chandra v. Nani Mohan(k)*, the sole executor who had applied for probate died pending the grant, and his widow as the heir of the deceased applied that her name should be substituted, but the application was refused. But in *Rama Naidu v. Rangayya(l)*, letters of administration with the will annexed were granted to the sons of the executor who died before the issue of the probate as the sons took benefit under the will.

- (2) If the executor has renounced or been cited and has not appeared.
- (3) If the executor is legally incapable or refuses to act.
- (4) If the executor is residing out of the province (sec. 254).

To whom Letters of Administration "cum testamento annexo" may be granted.—The general rule is that the grant follows the interest, *i.e.*, it should be made to the person who has the greatest interest in the estate of the testator. The universal or residuary legatee is the testator's choice. He is the next person in his election to the executor and has preference over all others. An universal legatee is one to whom the entire estate is given by the will(m). A residuary legatee is the person whom the surplus or residue of the property is bequeathed by the will, (sec. 102) and for obvious reason more interested than the other legatees in effecting a faithful complete and speedy administration of the estate. The grant under this section is discretionary.

If the residuary legatee is an idol, the proper person to whom the letters of administration with the will annexed should be granted is the shebait of the idol and not the priest(n).

The residuary legatee is passed over if he has no interest, *e.g.*, where he has assigned over his interest(o). If there are several residuary legatees, administration may be granted to one who represents the majority of interests(p). A residuary legatee is not entitled to probate(q). When the residue is settled, *e.g.*, to A for life and after his death to B, A is preferred to B, (Halsbury, Vol. 14, pp. 194-195, Hailsham Edn., Vol. 14, pp. 258-261). The grant under clauses (a) and (b) must be of the whole estate and not of the part of the estate and the probate duty must be paid on the value of all the property of the deceased(r).

Clause (c).

When the executor has proved the will but dies before having fully administered the estate, the grant of letters of administration with the will annexed is *grant de bonis non* under sec. 258. This clause, therefore, appears to be out of place. New representation as provided in sec. 258 may be made on the rules laid down in this section, *viz.*, that the grant should follow the interest. The words

(i) *Haribhassan v. Manmatha*, 45 Cal. 862.

(j) *Musst. Phenki v. Musst. Manki*, 9 Pat. 698.

(k) 36 Cal. 799.

(l) 56 Mad. 346.

(m) *Ram Rani v. Indrani*, A. I. R. (1942) Oudh 510.

(n) *Kali Krishna v. Makhan Lal*, 50 Cal. 233.

(o) *Mayhew v. Newsted*, 1 Curt. 593.

(p) *Sawbridge v. Hill*, (1871) L. R. 2 P. & D. 219.

(q) *Pundit v. Goukaran*, 6 C. W. N. 787; *In re Shaskee Bhusan Banerjee*, 19 Cal. 382.

(r) *Khubchand v. Motilbai*, A. I. R. (1936) S. 150.

“so much thereof as may be unadministered” apply to clause (c) only and not to clauses (a) and (b)(s). Whereas the grant under clauses (a) and (b) must be of the whole estate the grant under clause (c) may be of the estate remaining unadministered.

233. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

Right to administration of representative of deceased residuary legatee.

[This is sec. 197 of the *Succession Act X of 1865* and sec. 20 of the *Probate and Administration Act V of 1881*.]

Failing residuary legatee, the grant goes next in order to the legal representatives of the residuary legatee provided the residuary legatee has a beneficial interest. The representative, however, of a residuary legatee for life has no interest. Thus, where a testator appointed his wife residuary legatee for life and after her death appointed his daughter substituted residuary legatee, it was held that the husband of the daughter was entitled to administration in preference to the representative of the mother(t).

The word “representative” used in this section is not restricted to legal representative and the practice of the Bombay High Court to require the heir of a residuary legatee to first obtain representation to the estate of the residuary legatee and then to apply for letters of administration with the will annexed under this section was held to be not the correct practice(u).

234. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

Grant of administration where no executor, nor residuary legatee nor representative of such legatee.

[This is sec. 198 of the *Succession Act X of 1865* and sec. 21 of the *Probate and Administration Act V of 1881*.]

Failing executor or a residuary legatee or representative of a residuary legatee, the grant goes in the following order :—

(a) next-of-kin of the deceased entitled to administer if the person had died intestate, i.e., the next-of-kin in the order laid down in sections 218 or 219 as the case may be,

(b) any legatee having a beneficial interest, or

(c) a creditor of the deceased.

Sec. 234 is discretionary. Ordinarily the creditor comes in after the next-of-kin. But if the interest of the estate requires it, a grant may be made to a creditor in preference to a pecuniary legatee(v).

(s) *Khubchand v. Motilbai*, A. I. R. (1936) S. 150; 165 I. C. 202.

(t) *Weddrill v. Wright*, 2 Phillim. 243.

(u) *In re Manji Jetha*, 34 Bom. L. R. 606; A. I. R. (1932) B 270.

(v) *In re N. C. Viegas*, 1 B. H. C. R. 103.

Under sec. 8 of the Administrator-General's Act No. III of 1913, the Administrator-General has a right to letters of administration other than letters *pendente lite* in preference to that of (a) a creditor ; or (b) a legatee other than an universal legatee ; or (c) a friend of the deceased.

The section only comes into operation when no executor has been appointed or if appointed he declines to act. So long as he has not refused to act this section will not apply(w).

235. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned calling on the next-of-kin to accept or refuse letters of administration.

Citation before grant of administration to legatee other than universal or residuary.

[This is sec. 199 of the Succession Act X of 1865 and sec. 22 of the Probate and Administration Act V of 1881.]

Compulsory Citation.—Citations are of two kinds—compulsory and optional. Citation required under this sec. is compulsory or special. In all these cases where a party has a prior title to a grant, a citation must be issued to him before granting letters of administration to any other person. Therefore, the executor, if there be one, *must* be cited before a grant to a residuary legatee, unless the executor has renounced executorship, (sec. 229). A residuary legatee *must* be cited before a grant to the next-of-kin, and the next-of-kin *must* be cited before a grant to a legatee other than an universal or residuary legatee, and so on through all the gradations of priority.

A citation answers two purposes ; it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it the process provides a substitute for a voluntary renunciation on their part, (Coote's Probate Practice, 12th Edn., p. 242).

236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals, unless it is a company which satisfies the conditions prescribed by rules to be made by the Provincial Government in this behalf.

To whom administration may not be granted.

[This is sec. 189 of the Succession Act X of 1865 and sec. 13 of the Probate and Administration Act V of 1881.]

This section as originally enacted has been amended by the following Acts. By Act XVIII of 1927 the words "nor unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband" were omitted. By Act XVII of 1931 the following words were added, "nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the Governor-General in Council in this behalf." The words "Governor-General in Council" were deleted and "Provincial Government" substituted by the Government of India (adaptation of Indian Laws) Order 1937.

As to the persons entitled to the grant of letters of administration see sections 218 and 219. This section is similar to sec. 228. Just as probate cannot be granted

(w) *Viramma v. Seshamma*, 54 Mad. 266 ; 60 M. L. J. 264.

to a minor or to a person of unsound mind, letters of administration cannot be granted to a minor or to a person of unsound mind.

(a) **Minor.**—Letters of administration cannot be granted to a minor, nor can an application be made under sec. 246 by a guardian of the minor *durante minore ætate* for the use and benefit of the minors who are not solely entitled to the estate of the intestate. Sec. 246 will come into operation if the minor is *solely* entitled to the estate of the intestate^(x).

(b) **Lunatic.**—The same disability which applies to a minor applies to a lunatic person entitled to administration in case of intestacy. Sec. 246 will apply if the lunatic is *solely* entitled to the estate of the intestate.

(c) **Association.**—(See commentary to sec. 223).

CHAPTER II. Of Limited Grants.

Under this Chapter limited grants are of :—

- I. Grant Limited in Duration—Secs. 237 to 240.
- II. Grant for the Use and Benefit of others—Secs. 241 to 247.
- III. Grant for Special Purposes—Secs. 248 to 254.
- IV. Grant with Exception—Secs. 255 to 256.
- V. Grant *cæterorum* or Grant of the Rest—Sec. 257.
- VI. Grant *de bonis non*—Secs. 258 to 259.
- VII. *Cessate* Grants or Supplemental Grants—Sec. 260.

Grants limited in duration.

237. When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

[This is sec. 208 of the Succession Act X of 1865 and sec. 24 of the Probate and Administration Act V of 1881.]

Probate of Lost Will.—When a testamentary instrument has been lost or destroyed in such a way as not to effect a revocation, probate may be granted of a copy thereof upon proof of the due execution and attestation of the instrument limited until the original or an authenticated copy is produced^(y). The word “lost” means lost either in the testator's lifetime or since his death; the word “mislaid” is qualified by the expression “since the testator's death”^(z). This interpretation appears to be doubtful as the natural interpretation seems to be that the expression “since the testator's death” governs both the words “lost” and “mislaid.” It would seem, therefore, that if the will is lost in the testator's lifetime the presumption would be that it was revoked unless there is evidence to rebut the presumption^(a). According to the English law when even if the will was last traced to the

(x) *In re Yeshwantibai Vijaykar*, 31 Bom. L. R. 999; *Viramma v. Seshamma*, 54 Mad. 266.

(y) *In the goods of L. P. D. Broughton*, 29 Cal. 811.

(z) *Sarat Chandra v. Golap Sundari*, 18 C. W. N. 527.

(a) *Anwar Hossein v. Secretary of State*, 31 Cal. 885.

possession and is not forthcoming at his decease, there is a *prima facie* presumption, in the absence of circumstances tending to a contrary conclusion that the testator destroyed it *animo revocandi*, (Halsbury, Vol. 28, p. 572). Attention may be drawn in this connection to the next section where the words "since the testator's death" do not occur.

Draft Will.—If an authenticated copy of the will is not forthcoming but the draft of the will is preserved, it may be admitted to probate.

The petitioner must prove that the original will was lost since the death of the testator; if he fails to prove this fact to the satisfaction of the Court, probate will be refused(*b*).

Probate.—In this section and in section 238 the word "Probate" is used. It is only when an executor applies for grant of a lost will that probate will be issued. If any other person applies, he must apply for letters of administration with a copy or draft of the will annexed. In *Anwar Hossein v. Secretary of State for India*(*c*), application was made for letters of administration with the will annexed, and the will was alleged to be not forthcoming; letters of administration with the copy of the will annexed were ordered to be issued limited until the original will was produced.

Procedure.—The procedure is to annex a true copy of the will to the petition and the Court will determine whether there was a will of the testator in existence at his death, the circumstances as to its not forthcoming and whether the copy annexed is the true copy thereof(*d*). The applicant must prove (*a*) the due execution of the will (*b*) that the will was in existence at the testator's death and it has been lost since then and (*c*) the copy is a true copy.

Evidence.—A person relying on a lost will must not only show that there was a will, but must also show what were its terms(*e*). According to the rule in *Welch v. Phillips*(*f*) a will duly executed and traced to the testator's possession is not forthcoming at his death, the presumption is that it was destroyed by himself. But in India this presumption is not applied. In *Babu Lal v. Baijnath*(*g*), both parties failed to prove their respective allegations regarding the destruction of the will and as the original will was not forthcoming, it was held to be lost or misplaced and letters of administration with a copy of the will annexed were ordered to be granted. If a copy of the lost will is admitted as secondary evidence under sec. 65 of the Indian Evidence Act (I of 1872) and it is produced from proper custody and is over thirty years old, then the *signature authenticating the copy* alone may be presumed to be genuine under sec. 90 of the Evidence Act. But it is essential that the proof of the due execution and attestation of the original will must be tendered(*h*). The petitioner must in the first instance prove that the original was in existence at the testator's death and has been lost or mislaid since the testator's death(*i*) and the secondary evidence may be given to prove the lost will(*j*).

238. When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

Probate of contents of lost or destroyed will.

(*b*) *Efari v. Poderi*, 55 Cal. 182; A. I. R. (1928) C. 307.

(*c*) 31 Cal. 885.

(*d*) *Iskur Chunder v. Doyamoye*, 8 Cal. 864 at p. 868.

(*e*) *Cyril v. D'Altaides*, A. I. R. (1941) R. 33.

(*f*) 1 Moo P. C. 299.

(*g*) A. I. R. (1946) Pat. 25.

(*h*) *Basan Singh v. Brijraj*, 37 Bom. L. R. 805.

(*i*) *Efari v. Poderi*, 55 Cal. 482.

(*j*) *Mahomed Hussain v. Babu Kishwa Nandan*, 61 I. A. 250 at 261-262; 39 Bom. L. R. 979; A. I. R. (1939) P. C. 238.

[This is sec. 209 of the Succession Act X of 1865 and sec. 25 of the Probate and Administration Act V of 1881.]

The word "destroyed" means destroyed after the testator's death or in his lifetime by another person without his consent or by himself without intention. In such a case if no copy or draft has been preserved, probate may be granted of its contents or of its substance and effects, if they can be established by evidence. If a portion of the contents of the lost will is proved and not the whole, probate may be granted of such portion(*k*). Oral evidence will be admissible to prove such contents and even *post* testamentary declarations of the testator as to the contents of the will will be admitted as secondary evidence of the contents(*l*). (Williams on Executors, 12th Edn., p. 260). Probate can be granted of a portion only of the will to the extent to which the contents are proved when other portion is lost(*m*).

Evidence.—The contents of a lost will may be proved by secondary evidence. Such evidence may be—

(a) declaration verbal or written made by the testator either contemporaneously with or prior to the execution of his will. As to the declaration of a testator as to the contents of the will made *after* its execution the decisions are conflicting, (see Williams on Executors, 12th Edn., pp. 227-228). The question is not settled; the decision in *Sugden v. Lord St. Leonards*(*n*), where such declarations were admitted in evidence has not been overruled.

(b) Where the question is whether the lost will contain a clause revoking all previous wills, the evidence to be required is the best evidence of which the nature of the case admits.

(c) Evidence of a single witness would be sufficient if his veracity and competency is unimpeached(*o*).

Practice.—If the original will is lost and its terms proved to the satisfaction of the Court by secondary evidence a copy of such terms should be annexed to the probate or letters of administration as the case may be(*p*).

239. When the will is in the possession of a person residing

Probate of copy
where original
exists.

out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

[This is sec. 210 of the Succession Act X of 1865 and sec. 26 of the Probate and Administration Act V of 1881.]

This section only applies and the production of the original will is dispensed where the will or codicil or both are in the custody of a person residing abroad and is detained in a foreign country, but a copy of it is sent to this country. In such a case probate may be granted of such copy of the will to the executor, limited to

(*k*) *Kedar Nath v. Sarojini*, 26 Cal. 634.

(*l*) *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154; *Woodward v. Gouldstone*, 11 App. Cas. 469.

(*m*) *Kedar Nath v. Sarojini*, 26 Cal. 634; *Kedar Nath v. Raj Kumar*, 64 C. L. J. 394; A. I. R. (1939) C. 674.

(*n*) 1 P. D. 154.

(*o*) *Sugden v. Lord St. Leonards*, (1876) 1 P. D. 154; *Harris v. Knight*, 15 P. D. 170.

(*p*) *Sukumari Gupta v. Bharat Mandal*, 20 C. L. J. 148.

the time until the original or a certified copy thereof is produced(*g*). But if the person in whose possession the will is, resides within the province, he may be compelled to produce the will either by citation if he is an executor or by a summons. The Court will on the application of one who is next of kin of the deceased order the person in possession of the will to bring and deposit it in Court for the purpose of being inspected and a copy thereof taken by the applicant(*r*). The Court will not compel the applicant in such a case to prove the will(*s*). Even a solicitor has no lien on the original will executed by his client and he cannot refuse the production of it(*t*).

Procedure.—According to the English practice the executor should make an affidavit showing the manner in which the copy was transmitted to him, that a better or more authentic copy does not exist in this country and that it is essential for the interest of the estate that the probate be forthwith granted(*u*). See Coote's Probate Practice 18th Edn., p. 120.

240. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

[This is sec. 211 of the Succession Act X of 1865 and sec. 27 of the Probate and Administration Act V of 1881.]

A person who applies for letters of administration is required to swear that the deceased died intestate. It sometimes happens that the party cannot in conscience take the oath, for he may know or have reason to believe from the deceased's observations or from the information of others that there was a will in existence subsequently to the deceased's death. If no copy of the will can be produced and its contents cannot be substantiated he may take administration limited until the original or an authentic copy is produced(*v*).

Grants for the use and benefit of others having right.

241. When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

[This is sec. 212 of the Succession Act X of 1865 and sec. 28 of the Probate and Administration Act V of 1881. Under sec. 212 the word "attorney" alone appeared; under sec. 28 the word "agent" appeared. The words "attorney or agent" are both used in this section.]

GRANT FOR THE USE AND BENEFIT OF OTHERS.

Administration "durante absentia." This section deals with the subject of grant of administration with the will annexed to an attorney or agent when the executor is absent; sec. 242 deals with the same subject when there is no executor, but

(*g*) *In the goods of Lemme*, (1892) P. 89.

(*r*) *In re Balkrishna Ganpatji*, 1 B. H. C. R. 114.

(*s*) *In re Tiruvalur Mudali*, 1 M. H. C. R.

234.

(*t*) *Georges v. Georges*, 18 Ves. 294.

(*u*) *In re Nobodoorga*, 7 C. L. R. 387.

(*v*) *In the goods of Metcalfe*, 1 Add. 343.

the person entitled to the grant in the absence of the executor is absent from the province and sec. 243 deals with the same subject in case of intestacy. Where the *executor is absent*, from the province, letters of administration with the will annexed may be granted to the duly constituted attorney or agent of the executor for the use and benefit of his principal *limited* until he obtains probate or letters of administration. It is only when the executor is absent from the province that letters of administration under this section can be granted to an attorney or agent. If the executor is residing within the jurisdiction, the Court will not grant administration to his attorney or agent for his use and benefit(w). Under this section the attorney must be residing within the province(x). (See Bombay High Court Rule 628).

The word "attorney" means a duly constituted attorney holding a power of attorney from the executor for his use and benefit. The power of attorney is revocable and when the executor revokes it and desires probate, the Court is bound to grant it to him. The power may be general or special. But the power must be duly executed and attested, (see secs. 82 & 85 of the Evidence Act and the Powers of Attorney Act VII of 1882). The power of attorney shall be annexed to the petition and evidence shall be given of its due execution. A power of attorney executed before a notary public would be sufficient if the notary has made the usual declaration on the power and no affidavit of identification is necessary(y).

When there are two or more executors, and if the attorney is appointed by one of them only, no grant will be made to the attorney until the other executor or executors has or have renounced, or have been cited. A joint grant has been allowed to two attorneys of two executors (each executor appointing his own attorney) for the use, etc., of the executors during their joint lives so as to cease on the death of either of the constituents or the attorneys, or upon either executor applying for probate. (See Coote's Probate Practice, 16th Edn., p. 188).

If the power of attorney contain a power of substitution and the attorney exercises it the substitute may take the grant. (See Stoke's Succession Act, p. 147).

On the return of the executor to the province and applying for probate, the grant *durante absentia* ceases and expires and there is no necessity to expressly revoke such grant(z). Also, on the death of the absent executor, the letters of administration cease to be of any force, and the administrator cannot make a good title if he sells the property of the deceased, unless he can warrant to the purchaser that the executor is alive(a).

But so long as the grant is subsisting an administrator under this section is the legal representative of the deceased and has all the powers of an ordinary administrator.

When once probate is granted to an executor and the executor goes abroad, no letters of administration to his attorney can be granted under this section, but under sec. 252 letters of administration for the purpose of becoming a party to a suit to be brought against the executor or administrator may be granted(b).

Under rule 628 of the Bombay High Court Rules an application for letters of administration or administration with the will annexed may be made by a constituted attorney of a person residing out of the province *provided that such constituted attorney resides within the province* and that such application is made through an

(w) *In the goods of Burch*, 2 Sw. & Tr. 139.

(x) *In re Nesbitt*, 4 B. L. R. app. 49; *In the goods of Luckie*, 15 B. L. R. app. 8.

(y) *In the goods of Mylne*, 33 Cal. 625; *Goods of Henderson*, 22 Cal. 491; *In re Sladen*, 21 Mad. 492; (dissenting from 16 Cal. 776), *Goods of William Rennie*, 40 Cal. 74;

Venkatrama v. Sundarambal, 42 Bom. L. R. 412.

(z) *In the goods of Cassidy*, 4 Hagg. 360.

(a) *Webb v. Kirby*, 7 De. G. M. & G. 381.

(b) See sec. 251; see also, *In the estate of Thomas*, (1912) P. 177.

attorney of the Court. It is the uniform practice of the Bombay and Calcutta High Courts to grant letters of administration with the will annexed under this section to the attorney or agent of the executor without requiring him to give security under sec. 228(c). On the other hand the Allahabad High Court has adopted a contrary view(d). The question came up before the Madras High Court in *In re W. H. Sell*(e) and the Court adopted the view of the Bombay and Calcutta High Courts. It was held that sec. 228 was in chapter I of Part IX of the Act which contains general provisions with regard to the grant of probate and letters of administration. Sec. 241 falls in Chapter II which deals with limited grants. It may also be noted that under sec. 291 an administrator under this section is not required to execute an administration bond.

- 242.** When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from the province, letters of administration, with the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241.

Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer.

[This is sec. 213 of the Succession Act X of 1865 and sec. 29 of the Probate and Administration Act V of 1881.]

This section deals with the case where any person entitled to the letters of administration with the will annexed is absent from the province. In such case letters of administration with the will annexed may be granted to his attorney or agent limited as mentioned in the last section.

- 243.** When a person entitled to administration in case of intestacy is absent from the province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241.

Administration to attorney of absent person entitled to administer in case of intestacy.

[This is sec. 214 of the Succession Act X of 1865 and sec. 30 of the Probate and Administration Act V of 1881.]

This section deals with the case when a person entitled to the grant of letters of administration in case of *intestacy* is absent, and no other person equally entitled is willing to act. When all the next-of-kin reside-out-of the province then administration may be made to their attorney or agent.

- 244.** When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the will shall be granted to him.

Administration during minority of sole executor or residuary legatee.

[This is sec. 215 of the Succession Act X of 1865 and sec. 31 of the Probate and Administration Act V of 1881.]

Administration “*durante minore aetate*.”—This section applies when the minor is the *sole* executor appointed by the will or sole residuary legatee. Sec. 245

(c) *In the goods v. Leckie*, 15 B. L. R. Appx. 8. (e) (1940) Mad. 820

(d) (1905) A. W. N. 251.

applies if all the executors are minors or if all the residuary legatees are minors. This section does not apply if there are more than one executor and one of them is a major or in case of residuary legatees if one of them is a minor, because he who is of full age may act as executor.

When the minor is the sole executor or the sole residuary legatee, letters of administration cannot be granted to him (see sec. 236); but under this section grant of letters of administration with the will annexed may be made to his legal guardian and not to the natural guardian, or to such other person as the Court may think fit until the minor shall attain majority. This sort of administration is called "administration *durante minore aetate*." The expression "legal guardian" means a guardian appointed under the Guardian and Wards Act VIII of 1890(f). If there is a legal guardian of the person of the minor and another of the property of the minor, the latter is entitled to the grant, (see sec. 246 where the words, "care of his estate" are used). The Court of Wards is not a legal guardian(g). If the natural guardian wants to apply under this section he must first take proceedings under the Guardian and Wards Act to be appointed legal guardian(h). A guardian appointed by the father under sec. 60 of this Act would be a legal guardian within the meaning of this section. It is in the discretion of the Court to grant or refuse to grant letters of administration under this section to the legal guardian. The words "such other person as the Court may think fit" empower the Court to exclude the legal guardian. The Court will refuse the grant to a guardian (a) where he is very poor, (b) where he is very old or (c) where he is insolvent.

Determination of the Grant.—A grant of administration *durante minore aetate* contains the limitation "until he shall attain the age of majority." Such age will be the completion of 21 years if a guardian under the Guardian and Wards Act (1890) is appointed. In other cases it will be the completion of 18 years. The grant determines on the minor attaining the age of majority or if the minor dies under age. If the minor dies before attaining majority letters *de bonis non* may be granted under sec. 258(i). The grant determines whether the minor takes out probate or not after attaining majority. If he does not the estate remains without any legal representative.

An administrator *durante minore aetate* has all the powers of an ordinary administrator while the minority lasts; the only limitation is the minority of the person, there is no other limit(j). He is an ordinary administrator, he can pay the debts, sell or mortgage the estate, pay legacies, and do all other acts in due course of administration. *Vis-a-vis* the minor he is a trustee and is accountable to the executor when probate is granted(k).

245. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

Administration during minority of several executors or residuary legatees.

[This is sec. 216 of the Succession Act X of 1865 and sec. 32 of the Probate and Administration Act V of 1881.]

This section deals with the case of two or more minor executors and two or more minor residuary legatees and none has attained majority. In such a case

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| (f) <i>Bhagwati v. Bahuria</i> , (1920) Pat. 182; 5 Pat. L. J. 347. | (i) <i>the goods of Nirojini Debi</i> , 34 Cal. 706. |
| (g) <i>Ganjasur Koer v. The Collector of Patna</i> , 25 Cal. 795. | (j) <i>In the goods of Girris Chandra Mitter</i> , 6 C. W. N. 581. |
| (h) <i>Viramma v. Seshamma</i> , 54 Mad. 266; <i>In</i> | (k) <i>Re Cope</i> , 16 C. D. 49. |
| | (l) <i>Barada v. Gajendra</i> , 13 C. W. N. 557. |

an administration *durante minore aetate* may also be granted limited until any one of them attains majority(*l*). On any one attaining the age of majority and proving the will the grant determines.

246. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estate applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be.

[This is sec. 217 of the Succession Act X of 1865 and sec. 33 of the Probate and Administration Act V of 1881.]

This section has been amended by the addition of the word "minor" by the present Act. Under sec. 217 of the Succession Act of 1865 the word "minor" did not occur but the word occurred in sec. 33 of the Probate and Administration Act. The effect was that as regards persons governed by the Succession Act in case of intestacy, if the minor was solely entitled to the estate of the intestate, there was no provision for grant of letters of administration on his behalf. If the minor was sole executor or sole universal or residuary legatee grant could be made under sec. 215, (present sec. 244). The insertion of the word "minor" was to supply this omission. But it has created overlapping so far as the minor sole executor or sole residuary legatee is concerned, as sec. 244 has already provided for this contingency. So far therefore as this section is concerned the word "minor" should be confined to the case of intestacy. This section will only apply when the minor is solely entitled to the estate of the intestate(*m*). Granting of letters of administration under this section does not extend the age of majority upto 21 years under the Indian Majority Act IX of 1875(*n*).

Administration for the use and benefit of a lunatic.—If a *sole* executor or a *sole* universal or residuary legatee, or a person *solely* entitled to administration in case of intestacy is a lunatic, letters of administration with or without the will annexed as the case may be, may be granted to his committee, or if there be no committee to any other fit person for the use and benefit of the lunatic limited, until he shall become of sound mind. Where a sole executor becomes a lunatic after the grant of probate and before completion of administration the Court will grant letters under this section.

Under this section it is not necessary that the executor or the residuary legatee, etc., should have been adjudged a lunatic by the Court. When the executor, etc., has not been adjudged lunatic, the Court requires affidavits stating the fact of lunacy, and that no inquisition has been made, and, of course, no committee appointed.

His Powers.—An administrator appointed under this section has all the powers of an ordinary administration. Although sec. 314 only mentions "minority" the principle of that section applies to an administrator for the use and benefit of a lunatic.

(*l*) *Madhavrao v. Maneklal*, 2 Bom. L. R. 797.

A. I. R. (1929) B. 397.

(*m*) *In re Yeshwantibai*, 31 Bom. L. R. 999;

(*n*) *Lakshmi v. Tayagaraja*, 24 M. L. J. 450.

Determination of the Grant.

When administration has been granted under this section for the use and benefit of a lunatic, the grant ceases on the latter becoming sane, and he may take probate of the will or letters of administration as the case may be. The grant also ceases if the lunatic dies without recovering.

But if the administrator die, before the recovery of the lunatic's further administration is granted to some other person for the use and benefit of the lunatic.

If the lunatic die, the grant made for his use and benefit ceases and administration (with the will annexed) *de bonis non* is granted to some other person having interest, (Coote's Probate Practice, 16th Edn., p. 247).

Procedure.—The correct procedure under this section is to file two applications (1) to be appointed as the proper person to represent the lunatic and (2) an application for grant of letters(o).

247. Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

[This is sec. 218 of the Succession Act X of 1865 and sec. 34 of the Probate and Administration Act V of 1881.]

Administration “pendente lite.”—Under English law sec. 163 of the Judicature Act, 1925. provides that “where any legal proceedings touching the validity of the will of a deceased person or for obtaining, recalling or revoking any grant are pending, the High Court may grant administration of the estate of the deceased to an administrator who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction.”

Sec. 247 is exactly the same as above except that instead of the word “suit” occurring in this section, the expression “legal proceedings” is used which is more appropriate as probate proceedings are not strictly and technically suits.

The practice of the English Court is to appoint an administrator *pendente lite* in all cases where the Court of Chancery would appoint a receiver; but the Court must be satisfied as to the necessity of such an appointment and as to the fitness of the proposed administrator. If there is an executor whose appointment is not questioned and who is capable of discharging his duties, the Court will not appoint an administrator under this section(p).

To found jurisdiction there must be an action actually pending in the Probate Division. Mere filing of the caveat does not constitute an action within the meaning of this section but if an affidavit in support of the caveat is filed and the petition

(o) *Ma Chit v. Kyaw Maung*, A. I. R. (1938) R. 128.

(p) *Mortimer v. Paull*, L. R., 2 P. & D. 85 ;

Pandurang v. Dwarkadas, 35 Bom. L. R. 700.

turned into a suit, it will be legal proceedings and an administrator may be appointed if it is just and proper to do so(*q*). In *Wright v. Rogers*(*r*) letters of administration *pendente lite* were granted to the executors.

In *Nirod v. Chamakkarini*(*s*) it was held that an application under this section can only be made by the parties to the suit. According to the English practice, however, such an application may be made by any person interested in the estate, and even by a creditor of the deceased(*t*).

An administrator appointed under this section is an appointee of the Court and is not a nominee of the party to the suit. He is under the immediate control of the Court and must act under the directions of the Court(*u*). His functions commence from the order of appointment and terminate when final order is made in the suit, and if there is an appeal, until the final order of the Appeal Court(*v*). An administrator *pendente lite* may be appointed pending appeal(*w*). If there is no appeal his appointment terminates with a decree pronounced in favour of a will and does not continue until the executors obtain probate, and the case is not altered if there are no executors(*x*), (Williams on Executors, 12th Edn., pp. 351-357).

His Powers.

An administrator *pendente lite* has all the rights and powers of a general administrator *except the right of distributing the estate*. He renders himself liable if he intermeddles with the estate after his functions cease(*y*). An administrator *pendente lite* discharges his duty to account when his accounts are complete and does not contain false or fraudulent entries or omissions(*z*). He has power to receive and recover debts and file suits for the purpose(*a*). He can be sued without any leave from the Court(*b*). His position is similar to that of a receiver with this distinction that the administrator *pendente lite* represents the estate of the deceased for all purposes except distribution(*c*).

Grants for special purposes.

248. If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly.

[This is sec. 219 of the Succession Act X of 1865 and sec. 35 of the Probate and Administration Act V of 1881.]

ADMINISTRATION LIMITED FOR SPECIAL PURPOSES.

Probate for special purpose.—If an executor is appointed for any limited purpose, *e.g.*, for the purpose of administering the estate of another testator whose sole or surviving executor the deceased was, the probate shall be limited to that

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| (<i>q</i>) <i>Jogendra v. Attindra</i> , 13 C. L. J. 34 ;
<i>Bhuban Mohini v. Kiran</i> , 13 C. L. J. 47 ;
<i>Brindaban v. Sureswar</i> , 10 C. L. J. 263. | N. 576.
(<i>x</i>) <i>Wieland v. Bird</i> , (1894) P. 262. |
| (<i>r</i>) L. R. 2 P. & D. 179. | (<i>y</i>) <i>In the goods of Gopal Lal Seal</i> , 7 C. W. N. cciv ; <i>Khitish Chandra v. Radhika</i> , 35 Cal. 276 ; <i>Madhavrao v. Maneklal</i> , 2 Bom. L. R. 797. |
| (<i>s</i>) 19 C. W. N. 205. | (<i>z</i>) <i>Khitish Chandra v. Osmond</i> , 39 Cal. 587. |
| (<i>t</i>) <i>Tichborne v. Tichborne</i> , L. R. 1 P. & D. 780. | (<i>a</i>) <i>Walker v. Woollaston</i> , 2 P. Wms. 589. |
| (<i>u</i>) <i>Madavrao v. Maneklal</i> , 2 Bom. L. R. 797. | (<i>b</i>) <i>In re Toleman</i> , (1897) 1 Ch. 866. |
| (<i>v</i>) <i>Taylor v. Taylor</i> , 6 P. & D. 29. | (<i>c</i>) <i>Pandurang v. Dwarakadas</i> , 35 Bom. L. R. 700. |
| (<i>w</i>) <i>Sm. Pramila Bala v. Jyotindra</i> , 28 C. W. | |

purpose. If such an executor appoints an attorney or agent then the grant to such an attorney or agent shall be similarly limited.

If a testator appoint an executor of his will generally and another for particular purposes and the general and limited executors both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say, probate is therein granted of all the estate of the deceased to the general executor, and of that part thereof to the limited executor to which his executorship is expressly confined. If the general executor apply before the limited executor, the former takes a general probate, and a power is reserved of granting probate under limitations to the limited executor. Probate cannot be granted of a portion of the estate.

249. If an executor appointed generally gives an authority to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Administration,
with will annexed,
limited to particular
purpose.

[This is sec. 220 of the Succession Act X of 1865 and sec. 36 of the Probate and Administration Act V of 1881 with the addition of the word "or agent".]

An executor who is unable to apply for probate personally can give a power of attorney to an attorney or to his agent. Such power may be general or limited. If the power is limited to a particular purpose, the grant shall be limited to that purpose and it must be so stated in the grant of letters of administration. Under this section the grant can only be of letters of administration with the will annexed and not probate.

250. Where a person dies, leaving a property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

Administration
limited to property
in which person has
beneficial interest.

[This is sec. 221 of the Succession Act X of 1865 and sec. 37 of the Probate and Administration Act V of 1881.]

Administration of Trust Property.—This section applies where the deceased is the sole trustee or the last surviving trustee and the trust remains to be administered. The legal estate being vested in him the beneficiary or some other person on his behalf may apply for grant of letters of administration limited to the trust property. This section applies only when the deceased had the legal ownership of the property which he held in trust. A Mohant is the owner of the property of the Muth and on his death a person claiming to be his successor in office cannot apply for administration in respect of the Muth property under this section(d).

Persons entitled to grant under this section are—

- (a) A new trustee duly appointed or his nominee.
- (b) The beneficiary. An idol is a beneficiary(e).
- (c) Some person on behalf of the beneficiary.

- (d) A partner in respect of property of the partnership standing in the name of the deceased(f).

A person obtaining a limited grant under this section does not by virtue of it acquire nor has he power rightfully to dispose of any interest outside the limits of the grant(g).

251. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of ad-

Administration
limited to suit.

ministration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

[This is sec. 222 of the Succession Act X of 1865 and sec. 38 of the Probate and Administration Act V of 1881.]

Administration Limited to Suit.—Where it is necessary that the representative of a deceased person should be made a party to a suit, and the executor or administrator is unwilling to act, letters of administration may be granted to a nominee of the party limited for the purpose of representing the deceased in such suit. The suit may be one already filed or intended to be filed(h). An administrator appointed under this section is called administrator *ad litem* and is to be distinguished from an *administrator pendente lite* under sec. 247. An administrator *ad litem* is appointed when there is no one to represent the estate in the suit. He is a necessary party to the suit. An *administrator pendente lite* is not necessarily a party to the suit. He is appointed to safeguard the estate pending the suit and the determination of the question of the validity or invalidity of the will.

An administrator under this section has only authority to carry on the suit ; he has no authority to receive the fruits of it(i).

An application for letters of administration under this section can be granted only by the Court within whose jurisdiction the deceased had at the time of his death a fixed place of abode or any property(j).

252. If, at the expiration of twelve months from the date of any probate or letters of administration, the execu-

Administration
limited to purpose
of becoming party
to suit to be
brought against
administrator.

tor or administrator to whom the same has been granted is absent from the province within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

(f) *In re Adarji Dalal*, 32 Bom. L. R. 576.

(g) *De Silva v. De Silva*, 5 Bom. L. R. 784, (on appeal from 4 Bom. L. R. 849).

(h) *Khodadad v. Bai Jerbai*, (1938) Bom. 64

at 74.

(i) *In the goods of Dodgson*, 1 Sw. & T. r. 259.

(j) *Fardunji v. Nacajbai*, 17 Bom. 689.

[This is sec. 223 of the Succession Act X of 1865 and sec. 39 of the Probate and Administration Act V of 1881.]

This section is founded on the first and third Sections of Statute 38 Geo. 3 c. 87 (An Act for the Administrator of Assets in cases where the Executor to whom Probate has been granted is out of the Realm) and relates to the appointment of an administrator *ad litem* providing a method to carry the decree of the Court into effect when the representative is out of jurisdiction. Administration may be granted *ad litem* by the Probate Court with a view to commencing or carrying on proceedings on the Original Side. The distinction between this section and the previous section is that under the previous section the executor or administrator is unable or unwilling to act. Under this section an administrator *ad litem* is appointed when the executor or administrator is continuously absent from the province for twelve months after the grant of probate or letters of administration is made. The period of 12 months is mentioned being the executor's year under sec. 337. It would seem, therefore, that if the litigation is started within twelve months from the date of grant, this section will not apply, and the executor or administrator to whom the grant was made must be sued whether he is in the province or is absent from the province. The words "at the expiration of twelve months" which also occur in the English statute have been held to mean "at or after" the expiration of such period(*k*).

Administration limited for becoming party to suit when the executor or administrator is absent.—The authority of an administrator appointed under this section does not terminate on the death of the executor or administrator, the grant being made not for a limited time, but for a limited purpose, *viz.* for the purpose of becoming a party to a suit and carrying the decree which may be made therein into effect(*l*). If the original executor or administrator returns and the suit is pending he must be made a party to the suit; the temporary administrator may account, have costs, and be discharged. But payment of a debt to an administrator appointed during the absence of the executor is a good payment even after the return of the executor, provided the debtor who paid the money had no notice of the return(*m*).

253. In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court.

Administration limited to collection and preservation of deceased's property.

[This is sec. 224 of the Succession Act X of 1865 and sec. 40 of the Probate and Administration Act V of 1881.]

Letters of Administration "*ad colligenda bona*."—Letters granted under this section are technically called "*ad colligenda bona*." *Ad colligendum bonum* means for the purpose of gathering up the goods of the deceased. Grant under this section is made when there is danger to the estate on account of delay in obtaining the full grant. Letters *ad colligendum* will be granted not only to any one whom the Court considers for the occasion eligible, but will also be made to the persons who are entitled to a full grant if the interests of the estate cannot wait or to entire

(*k*) In the goods of Ruddy, 2 P. & D. 330.
(*l*) *Rainsford v. Taynton*, 7 Ves. 466.

(*m*) *Walker v. Woollaston*, 2 P. Wms. 589.

strangers whom mere chance has brought into connection with the affairs, (Coote's Probate Practice, 15th Edn., p. 172).

Powers of such administrator are limited by the terms of the grant. Ordinarily his powers are to collect and preserve the estate and to give discharges for the debts due to the estate, (Halsbury, Vol. 14, p. 204 and Hailsham Edition, Vol. 14, p. 274).

254. (1) When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than

Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled to administration.

the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

[This is sec. 225 of the Succession Act X of 1865 and sec. 41 of the Probate and Administration Act V of 1881.]

This section corresponds to sec. 73 of the Probate Act, 1857 (20 and 21, Vict. c. 77). Grant under this section is made for the protection and preservation of the estate of the deceased. A very wide discretion is given to the Court by this section as to the person to be appointed administrator. It is open to the Court to appoint a public official administrator(n). The Court will decline to exercise its discretion if the application is not *bona fide*(o). By the Judicature Act, s. 162, section 73 is repealed and powers of the Court are curtailed.

Appointment as administrator of person other than one who under ordinary circumstances would be entitled to administration is made only wherever it shall appear to the Court to be necessary or convenient, that some person *other than the person who under ordinary circumstances would be entitled to a grant of administration*.

Before appointing an administrator under this section the Judge will take the following elements into consideration: (a) consanguinity, (b) amount of interest, (c) the safety of the estate, and (d) probability that it will be properly administered(p). If the Court is once satisfied with regard to these elements, the Court has no power to order that another person who has no present interest should be associated with the applicant(q).

The Court will appoint an administrator under this section in the following cases—

- (a) In case of intestacy.
- (b) In case of will if there is no executor or if the executor is unwilling or incompetent or is absent.

(n) *E. J. John v. Collector of Malabar*, A. I. R. (1944) M. 189.

(o) *Narendra v. Charu Chandra*, 12 C. W. N. 747.

(p) *Sivadas v. Surendra*, 40 C. L. J. 24.

(q) *Annapurna v. Kallayani Dasi*, 21 Cal. 164. See also *In re Kamineymoney*, 21 Cal. 697.

By this section most extensive powers are given to the Court. Grant under this section is discretionary and will be made if a case for *protection* or preservation of the estate is made out(r). This section will not apply when there is an executor who is willing and competent to act.

Grants with exception.

Probate or administration, with will annexed, subject to exception.

255. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

[This is sec. 226 of the Succession Act X of 1865 and sec. 42 of the Probate and Administration Act V of 1881.]

As a general rule probate is granted of the entire estate and of the entire will. This section deals with the grant of probate or letters of administration with the will annexed with exception. Exceptions are of two kinds: (1) exception as regards part of the estate of the deceased, and (2) exception as regards portion of the will of the deceased. This section is taken from Coote's Probate Practice, 15th Edn., p. 176. The words there used are "whenever the nature of the case *and the law* requires. In this section the words "and the law" are omitted. Strictly speaking the exception contemplated by this section is part of the property and not part of the will (see Basu's Succession Act 2nd Edn., p. 945).

(a) **Exception as to the part of the Property.**—Rule 627 of the Bombay High Court Rules provides that except by order of the Judge no person entitled to a general grant will be permitted to take a limited grant. This section enacts that where the nature of the case requires that some fund or property be excluded from the general grant, the Court may do it, *e.g.*, if a testator appoints one executor for a special purpose or a special fund and another executor for all other purposes, the latter may take probate save and except that purpose or fund, (Coote's Probate Practice, 16th Edn., p. 228). It is only in special cases that probate in respect of a portion of the property can be granted(s)..

(b) **Exception as regards Portion of the Will.**—Where a clause can be shown to have been introduced into a will by means of fraud practised upon the testator or by forgery after his death, it is excepted out of the grant. The Court will also except out of the grant a word or clause which has been introduced into the will *per incuriam* without the knowledge or instructions of the testator(t) or which is not proved to have been prepared under instructions from the testator(u). Where any provision is found in a will under which the writer of the will gets a substantial advantage and there is a ground for suspicion that the testator neither approved nor was even aware of that provision in the will, probate should not be granted in respect of that portion, but probate should not be refused in respect of the remainder of the will as to which there is no suspicion(v). But the Court cannot even by consent order a passage of the will to be expunged which the testator intended to form part of it nor can the Court make any alterations or insertions in the will of which probate has been granted(w). (Williams on Executors, 12th Edn., pp. 225-226).

- (r) *Goods of Kaminemoney*, 21 Cal. 697; *Annapurna Dasi, v. Kalyani Dasi*, 21 Cal. 165; *Hara Coomar v. Doorgamani*, 21 Cal. 195; *Narendra v. Charu Chandra*, 12 C. W. N. 747.
(s) *Satpal v. Collector of Multan*, 12 Lah. 584.
(t) *Rhodes v. Rhodes*, (1882) 7 App. Cas. 192;

- In the goods of Oswald*, L. R. 3 P. & D. 162; *In the goods of Boehm*, (1891) P. 247.
(u) *Hormasji v. Dhanjishaw*, 12 Bom. L. R. 569.
(v) *Sarat Kumari v. Sakichand*, 8 Pat. 382 P. C.; A. I. R. (1929) P. C. 45.
(w) *In the goods of Wakeley*, 69 L. T. 419.

The Court has, also, power to direct a passage containing a gross libel to be omitted from the probate copy of the will, though it will not exercise the power merely on the ground that the charge is offensive and untrue(x).

The Court will not supply words accidentally omitted from the will(y).

The following rules are to be observed in cases where words are inserted *per incuriam* :—*First*, where the mind of the draftsman has really been applied to the particular clause then whether the error has arisen from the fact that he misunderstood the instructions of the testator or having understood the instructions has used inappropriate language in seeking to give effect to them, the testator is, in the absence of fraud, bound by the error so made as if it were his own even if the mistake were not directly brought to his notice and the Court will not omit from the probate the words so introduced. *Second*, where the mind of the draftsman has never really been applied to the words of the particular clause and the words are introduced into the will *per incuriam* without advertance to their significance and effect by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless introduction of such words was brought to his notice, (Mortimer on Probate, pp. 107-111). The Court may admit to probate all that is written above the testator's signature and reject what is written below, but only if satisfied that such signature was intended by the testator to give effect to the words preceding it as his will(z), (Mortimer on Probate, p. 125).

256. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Administration with exception.

[This is sec. 227 of the Succession Act X of 1865 and sec. 43 of the Probate and Administration Act V of 1881.]

Administration with exception.—Whenever the nature of the case requires that an exception be made, *e.g.*, when the testator has made a will for a particular or limited purpose or of his property only at one particular place and has died intestate as regards the rest, letters of administration may be granted subject to such exception, *i.e.*, excepting the property disposed of by the will(a).

Hindus.—In the case of the will of a Hindu, if the whole estate is vested in the executor he must obtain probate of the entire estate(b). Similarly letters of administration limited to certain property cannot be granted. If a Hindu takes out administration it must be general(c), except only in a special case *e.g.*, when shares of joint stock companies belonging to joint Hindu family but standing in the name of the Karta or Manager of the family(d).

Grants of the rest.

257. Whenever a grant with exception of probate, or of letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the

Probate or administration of rest.

(x) *In the goods of Wartnaby*, 1 Rob. 423 ; *Marsh v. Marsh*, 1 Sw. & T. 528.

(y) *Re Boehm*, (1891) P. 247.

(z) *Shama Charn v. Khettrmoni*, 27 Cal. 521 at 527.

(a) *In the goods of Cowar Suttia Krishna*, 10 Cal. 554 ; *Stoney v. Stoney*, 2 Pat. 508.

(b) *Re Thaker Madhavji Dharamsi*, 6 Bom.

460.

(c) *In the goods of Ramchand Seal*, 5 Cal. 2 ; *In the goods of Grish Chunder Mitter*, 6 Cal. 483.

(d) *In the goods of Cowar Suttia Krishna Ghosaul*, 10 Cal. 554 ; *Bai Ujambai v. Harakchand*, 59 Bom. 644 at 649 ; *Sri Ram v. Collector of Lahore*, A. I. R. (1942) L. 173.

deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

[This is sec. 228 of the Succession Act X of 1865 and sec. 44 of the Probate and Administration Act V of 1881.]

GRANTS OF THE REST OR GRANTS *CÆTERORUM*.

Grant under this section is technically called "*Grant Cæterorum*". This grant follows upon a limited grant. It is granted for that part of the estate or for that purpose which was excluded from the scope of the grant "save and except" to which it is complementary (Coote's Probate Practice 16th Edn. 229.) It is made when the testator has an executor for a special purpose or of a specific fund and another executor for all other purposes and the first mentioned executor has taken his limited probate, the other may take probate of the rest of the testator's estate. So when the deceased has made a will and appointed an executor for a special purpose, or for a specific fund or property only and has died intestate in all other respects his next-of-kin after the executor has taken a limited probate, may obtain letters of administration of the rest of the estate.

Grant of effects unadministered.

258. If an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

[This is sec. 229 of the Succession Act X of 1865 and sec. 45 of the Probate and Administration Act V of 1881.]

Where a sole or last surviving executor dies without having fully administered the estate of the deceased his executor in case he leaves a will or his administrator in case he dies intestate does not represent the original testator. It is accordingly necessary to appoint an administrator to administer the estate of the original testator left unadministered. Such an administrator is technically called administrator *de bonis non*.

Similarly upon the death of a sole or surviving administrator leaving estate unadministered, an administrator *de bonis non* may be appointed. There is no such provision in the Act; but the English practice is followed (e), (see Halsbury, Vol. 14, p. 196 and Hailsham Edition, Vol. 14, p. 263). An administrator of an intestate is merely an officer of the Court in whom the deceased has reposed no trust. On his death the estate does not pass to his heirs or representatives. The office comes to an end on his death and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non* and the person to whom the grant is made will be entitled to take possession of the property.

When there are two or more executors and one of them dies before the estate is fully administered, this section does not apply as the surviving executors fully represent the estate. It is only when the sole executor or the last surviving executor dies that the chain of representation is to be continued under this section. In England it is only in the case where the sole or the last surviving executor dies *intestate* that the *de bonis* grant is made, as the executor of an executor represents the original testator but not the administrator of the executor. Here according to the decision in *De Souza v. The Secretary of State* (f), the executor of an executor is

(e) In the goods of *Giris Chandra Mitter*, 6 C. W. N. 581.

(f) 12 B. L. R. 423; *Nalhu Ram v. Alliance Bank*, A. I. R. (1920) L. 546.

not a derivative executor. If an executor or administrator dies without having fully administered the estate, the duty of carrying the administration of the estate will not devolve upon the deceased's executor's executor or administrator, but a new representative must be appointed under this section. The administrator of an executor is also not a derivative executor(g).

Effects Unadministered.—Grant under this section is only to be made when the estate of the original testator is not fully administered. The applicant must show that there is some estate which requires to be administered(h). The question as to whether the estate is fully administered depends on the facts of each case. Generally speaking when the funeral and testamentary expenses have been paid, outstandings recovered, debts have been paid, and legacies and annuities satisfied or provided for and the surplus of the estate invested in authorized securities or as provided by the will, the executor drops his character as executor and becomes a trustee in the proper sense. If under the will he is the universal or residuary legatee, his original status as executor drops and he becomes a legatee. If he is not a residuary legatee, he becomes a trustee of the residue for the beneficiaries under the will. If such a stage of administration is reached, there is no estate unadministered and no application can be made for *de bonis* grant(i). The executor may if he wants get himself discharged by application to Court under sec. 301 or by appointing new trustees(j), (Lewin on Trusts, 11th Edn., p. 816).

His Powers.—Under sec. 313 the administrator *de bonis non* has, with respect to effects unadministered, the same powers as the original executor or administrator. It is not necessary for him to ask for leave under sec. 307 to dispose of the property(k) (Williams on Executors, 12th Edn., p. 591; Coote's Probate Practice, 16th Edn., pp. 231-244).

259. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered.

[This is sec. 230 of the Succession Act X of 1865 and sec. 46 of the Probate and Administration Act V of 1881.]

Letters of administration *de bonis non* shall be granted to those persons only to whom original grants might have been made, i.e., they will ordinarily be granted to the person entitled according to the general principles already stated in cases of administration *cum testamento annexo*, i.e., to those who have the greatest interest. If the executor is also a beneficial residuary legatee, his representative will be entitled to the administration *de bonis non* of the original testator(l). If there is no residuary legatee the grant may be made to a pecuniary legatee.

260. When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when limited grant expired and still some part of estate unadministered.

(g) *Ramanathan v. Ragammal*, 17 M. L. T. 611, 21 I. C. 849.

(h) *Lakshmi v. Nandaranani*, 9 C. L. J. 116.

(i) *Gour Chandra v. Sreemati Monmohini*, 25 C. W. N. 332; *Chandicharan v. Banke Behari*, 10 C. W. N. 432.

(j) *Ex-parte Amerchand Madhowji*, 29 Bom. 188.

(k) *Goods of Mary Hemming*, 23 Cal. 579.

(l) *Moosa Haji v. Haji Abdul*, 5 Bom. L. R. 639.

[This is sec. 231 of the Succession Act X of 1865 and sec. 47 of the Probate and Administration Act V of 1881.]

SUPPLEMENTAL OR CESSATE GRANTS.

Grants under this section are technically called "*Cessate Grants*."

Cessate grant is a re-grant of the *whole* of the deceased's estate just as it was sworn and embraced by the original grants. (Coote's Probate Practice 16th Edn., p. 245). Grant *de bonis non* is a grant of that portion only of the estate which is unadministered. A *cessate* grant is an absolute and permanent grant, following a temporary one.

Such a grant is made where a testator has directed that in a certain event some other person shall be substituted for his original executor or where the first grant is made for the use and benefit of a person under disability and the disability is removed, or where the grant has been made of the contents of a lost will and the original will is produced. Such a grant is a *second grant*. It differs from another grant which is called *double grant*. A double grant is made when one or some only of several executors have in the first instance obtained probate and subsequently another executor desires to come in and take probate (Coote's Probate Practice 16th Edn., p. 250).

CHAPTER III.

Alteration and Revocation of Grants.

261. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

[This is sec. 232 of the Succession Act X of 1865 and sec. 48 of the Probate and Administration Act V of 1881.]

What errors may be rectified by Court.—The Court may make the following rectifications in the grant of probate or letters of administration which may be altered and amended accordingly. It is only errors in probate and letters of administration alone that can be rectified under this section but not errors in will. For corrections of errors in wills, see sections 76 and 77.

(1) Errors in names and descriptions, *e.g.*, where the surname or Christian name of the deceased is misspelt or the *status* of the deceased, if a female is misstated(*m*).

(2) Errors in setting forth the time and place of the deceased's death, or,

(3) Error in the purpose in a limited grant.

(4) A clerical error in the printed form of the probate(*n*).

Where the will contains a misdescription or an insufficient description of the person appointed as executor, the grant will describe the person correctly(*o*). If the will contains a clerical error the word inserted by error will be struck out of the grant and no fresh word being inserted in the blank(*p*).

In all these cases the Testamentary Registrar will direct that the required amendments be made in the grants on the necessary proof and identification being adduced.

(m) *In the goods of White*, 4 Cal. 582.

(n) *Girindra v. Rajiswari*, 27 Cal. 5.

(o) *In the goods of De Rosaz*, (1877) 2 P. D. 66.

(p) *In the goods of Schott*, (1901) P. 190.

If the total amount of the estate is increased by the amendment, the estate must be resworn and the additional stamp duty must be paid.

262. If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

Procedure where
codicil discovered
after grant of ad-
ministration with
will annexed.

[This is sec. 233 of the Succession Act X of 1865 and sec. 49 of the Probate and Administration Act I of 1881.]

If, after the grant of *letters of administration* with the will annexed, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

But if a codicil be discovered after the grant of probate, a *separate* probate is granted of that codicil and the first probate undergoes no alteration or amendment whatever. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together. (see secs. 225 and 263, ill. vii).

Procedure.—Application for amendment must be made to the Court which issued the grant(*q*). An appeal lies from an order refusing amendment(*r*).

263. The grant of probate or* letters of administration may be revoked or annulled for just cause.

Revocation or
annulment for just
cause.

Explanation.—Just cause shall be deemed to exist where—

- (a) the proceedings to obtain the grant were defective in substance ; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or
- (d) the grant has become useless and inoperative through circumstances ; or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

(q) *Sukumari v. Bharat Mandal*, 20 C. L. J. (r) *Girindra v. Rajeswari*, 27 Cal. 5. 148.

Illustrations.

- (i) The Court by which the grant was made had no jurisdiction.
- (ii) The grant was made without citing parties who ought to have been cited.
- (iii) The will of which probate was obtained was forged or revoked.
- (iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.
- (v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
- (vi) Since probate was granted, a later will has been discovered.
- (vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.
- (viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

[This is sec. 234 of the Succession Act X of 1865 and sec. 50 of the Probate and Administration Act V of 1881 with the following alteration.—The explanation “Just cause is” is changed into “Just cause shall be deemed to exist where”.]

Revocation of Grant of Probate and Letters of Administration.

The circumstances under which the grant may be revoked are mentioned in the *Explanation* and the same are exhaustive and not illustrative of the cases in which the grant can be revoked(s). This section gives the Court a discretion to revoke the grant if “just cause” is established. This discretion is to be exercised judicially and not arbitrarily and a clear case of “just cause” must be made out. This is implied by the word “may,”(t). The circumstances under which a grant can be revoked under this section may be classified under the following heads : (1) When there is substantial defect in the proceedings to obtain the grant, (2) when the grant is obtained under false suggestion, (3) when a subsequent will or codicil is discovered (ill. vi & vii), or (4) when required for the better administration of the estate (ill. viii). It is only under this section and this section alone and on the grounds laid down therein that an application for the revocation of the grant must be made(u). A grant can only be revoked when it is actually issued. When merely an order is made for the issue of a grant, but the grant is not actually issued, the Court has no jurisdiction to act under this section(v). The explanation of the expression “Just Cause” given in this section is exhaustive(w). In *Ramanandi v. Kalavati*(x) it is observed by their Lordships of the Privy Council that, “There has been some divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate due in part to the introduction into Indian practice of the difference in English law between the grant of probate in Common Form and probate in Solemn Form. It is worse than unprofitable to consider how far if at all that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.”

Grounds of Revocation.

(1) **The Proceedings to obtain the Grant were substantially defective.**
—Illustrations (i) and (ii) fall under this head. The defect must be a substantial

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| (s) <i>Annoda v. Kalikrishna</i> , 24 Cal. 95; <i>Gulam Ali v. Rahmatulla</i> , A. I. R. (1941) R. 259; <i>Harris v. Spencer</i> , 35 Bom. L. R. 708. | (v) <i>Jamsetji v. Hirjibhai</i> , 37 Bom. 153. |
| (t) <i>Dina Bandhu v. Sarala Sundari</i> , (1940) 1 Cal. 88 at p. 46. | (w) <i>Bal Gangadhar Tilak v. Sakwarbai</i> , 26 Bom. 792 at p. 798; <i>Annoda v. Kalikrishna</i> , 24 Cal. 95. |
| (u) <i>An vs Pundar Girdhar</i> , 5 Bom. 633. | (x) 55 I. A. 18; 7 Pat. 221 (P. C.); 30 Bom. L. R. 227. |

defect, e.g., where the Court has no jurisdiction at all in making the grant. The question of jurisdiction arises under sections 270 to 274. If the deceased neither resided nor had any property in the province where the District Court made the grant it would be a substantial defect. As regards illustration (ii) citations are of two kinds, compulsory and optional. Where a person having the superior right to prove a will or take administration is not cited, and the Court makes the grant to a person having an inferior right, the defect in procedure is substantial(g). Absence of service of special citation on a person who ought to be served is a "just cause," unless the non-cited party had knowledge of probate proceedings or if he is not prejudicially affected thereby(z). In *Ramanandi v. Kalawati*(a) the plaintiff alleged that the proceedings to obtain the grant were defective as the grant was made without citing parties who ought to have been cited. The plaintiff was an infant residing with her mother the widow of the testator. A general citation was affixed to the house of the deceased and another to the Court House; notices were issued to the widow and the plaintiff and a report was made by the serving officer showing that service of the notices was acknowledged on the widow's behalf "for self and guardian of Ramanandi Kuer" by Awadh Bihari Singh. Probate was granted. After some years the plaintiff started proceedings to set aside the probate alleging that citations were not properly served and that the proceedings were defective in substance. It was held by their Lordships of the Privy Council that there was a just cause for revoking probate. This case was followed in *Seema v. Seema*(b). In *Haimabali v. Kunja Mohan Das*(c) the grant was revoked after a lapse of 32 years on the ground of want of proper service of citation on the minor.

There is, however, a distinction in the matter of the service of citation when there is a will and when there is an intestacy. In the former case proof of a will is essential to the grant and a want of proper service of citation may affect, the interest of the person who ought to be cited; but there is no such thing in the case of grant of letters of administration, it only affects the preferential right of administration(d).

If a person who is a necessary party to probate proceedings, is not made such a party, neither his knowledge nor his acquiescence nor lapse of time will be a bar(e). Where, however, citation is discretionary and a person who may be interested in disputing the genuineness of the will is not cited and probate is granted *ex-parte*, the mere absence of citation does not invalidate the grant because the will may be a perfectly genuine will and the opposition of persons who ought to have been cited might have proved ineffective(f). Also where an executor has obtained probate of a will in common form, he may be afterwards cited by a next-of-kin to prove it *per testes* or in solemn form and if the executor fails to prove the will sufficiently the probate will be revoked(g).

(2) **The Grant was obtained by False Suggestions.**—Illustration (iii), probate of a forged or revoked will and illustration (iv) fall under this head. In the Privy Council case of *Ramanandi v. Kalawati*(h), the grant was revoked after eight years on the discovery that the will propounded was a forgery. A grant of letters of administration obtained fraudulently is void(i).

According to sec. 275 the statements made in the petition for grant are conclusive and after the grant is made, they can only be challenged by a proceed-

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| <p>(y) <i>Hormusji v. Dhanbaiji</i>, 12 Bom. 184 ;
 <i>Elokeshi v. Hari Prosad</i>, 30 Cal. 528 ;
 <i>Sarojini v. Rajlakshmi</i>, 47 Cal. 838 ; <i>Charubala v. Menaka</i>, 38 C. W. N. 1010.</p> <p>(z) <i>Dinabandhu v. Sarala Sundari</i>, A. I. R. (1940) C. 296.</p> <p>(a) 55 I. A. 15.</p> <p>(b) (1938) Rang. 760 (F. B.).</p> <p>(c) 35 C. W. N. 387 ; A. I. R. (1931) C. 713</p> | <p>(d) <i>Ranmaya v. Betty</i>, A. I. R. (1927) C. 207.</p> <p>(e) <i>Manoram v. Shiva</i>, 42 Cal. 480.</p> <p>(f) <i>Digambar v. Narayan</i>, 13 Bom. L. R. 38.</p> <p>(g) <i>Elokeshi Dassi v. Hari Prosad</i>, 30 Cal. 528.</p> <p>(h) 7 Pat. 221.</p> <p>(i) <i>Debendra v. Adm. General of Bengal</i>, 35 I. A. 109 ; 35 Cal. 955 (appeal from 33 Cal. 713 ; 9 <i>Mokshdayini v. Karnadhan</i>, 19 C. W. N. 1108.</p> |
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mgs in revocation under this section that the grant was obtained by a fraud on Court(j).

(3) **When the grant is obtained by Untrue Allegations of Fact :—**Under this ground will fall statements as to the residence of the deceased or of his property e.g. if in the petition the property of the deceased is described to be within the jurisdiction of the Court and it turns out to be not, the grant will be revoked(k). or where a woman claiming to be the widow of the deceased was in fact she never married to him(l) or by illegitimate relatives or by a guardian of a minor where there is a testamentary guardian or where the grant of probate of the will of a living person is obtained, in all such cases the grant will be revoked.

(4) **When the grant has become Useless or Inoperative, e.g., when subsequent Will or Codicil is discovered.**—A grant becomes useless in two ways (a) When the purpose of the grant is fulfilled and (b) by the discovery of a subsequent will or codicil. This section deals with the second branch of the law, see illustrations (v) (vi) and (vii).

As regards the first branch when the purpose of the grant is fulfilled, e.g., when the estate is completely administered, the administrator becomes *functus officio* and the grant in effect stands cancelled. It is not necessary to expressly revoke such a grant(m).

As regards the discoveries of subsequent will or codicil the grant previously made must be revoked under this section e.g., if after the grant of letters of administration to the estate of a person on the ground that he died intestate, a will is found, the grant will be revoked and probate will be granted of the will. Also if probate is granted of a will on the ground that it is the last will of the deceased but subsequently another will of later date is discovered revoking all previous wills, probate granted of the first will will be revoked and fresh probate granted of the later will.

As regards discovery of codicils the law stands as follows :—If a codicil is discovered after the grant of probate and if that codicil in no way repeals the appointment of executors made by the will, a separate probate of that codicil is granted under sec. 225. But if such codicil revokes or adds to the appointment of executors under the will, the probate granted of the will will be revoked and a fresh probate granted of the will and codicil, (illustration vii). If after the grant of letters of administration with the will annexed a codicil is discovered, then it may be dealt with under sec. 262. An application for revocation of probate on discovery of codicil should be made to the Court which granted the probate(n).

Under sec. 211(2) no letters of administration can be granted in respect of the estate of a deceased person who was a member of a joint Mitakshara family along with other co-parceners. If, however, a grant is made, it is a nullity. It is not useless or inoperative within the meaning of this section. It is, therefore, not necessary that such a grant should be revoked(o).

In *Bal Gangadhar Tilak v. Sakwarbai*(p) an application for revocation of probate was made by the widow of the testator on the following facts. The will recited that the wife of the testator was pregnant and provided that if no son was born or if one was born and should die prematurely his wife should adopt a son and the executor should manage the property on behalf of such

(j) *Harris v. Spencer*, 35 Bom. L. R. 708.

(k) *In the goods of De Silva*, 25 All. 335.

(l) *In the goods of Moore*, 3 *Notes of Cases* 601.

(m) *Mrs. Kishanbai Bewa v. Karamchand*, 43 C. W. N. 4; 68 C. L. J. 8; A. I. R.

(1938) C. 714.

(n) *Forbes v. Peterson*, A. I. R. (1941) C. 417.

(o) *Durgaprasad v. Jewdhari*, 62 Cal. 733 at 739.

(p) 26 Bom 792.

son until he attained majority. A posthumous son was born but died shortly. The widow applied for revocation on two grounds (a) that the will had become inoperative by the birth of the son who succeeded to the property which on the son's death devolved on her as his heir and (b) that the executor had wilfully and without reasonable cause omitted to file an inventory and accounts. The Court held that the order for revocation could not be made. The circumstances which had supervened with regard to the devolution of the property was no ground for revocation. The Court observed that the expression "become useless and inoperative" in this section imply the discovery of something which if known at the date of the grant would have been a ground of refusing it *e.g.*, the discovery of a later will or codicil or the subsequent discovery that the will is forged or the alleged testator was still living. In *Surendra Nath v. Amritlal Pal*(q) the Calcutta High Court has, however, observed as follows. "We are not prepared to accept the view that the clause applies only to cases where the circumstances which have made the grant useless and inoperative were in existence at the date of the grant, though unknown to the Court and to the parties concerned. The phraseology of the clause is sufficiently general to make it applicable to cases where the circumstances contemplated have happened since the date of the grant". And in support of this the Learned Judge points out *ill. (viii)* which the learned Judge says was overlooked in *Tilak's* case.

(5) **When required for the better Administration of the Estate.**—The grant may be revoked where the executor or administrator becomes incapable of acting by reason of insanity, (*illustration viii*) or ill-health(r), or where the executor or administrator has disappeared(s).

Where probate or letters of administration has or have been granted to a single executor or administrator and the executor or administrator subsequently becomes a lunatic, the practice in England is not to revoke the probate or letters of administration already granted, but to grant administration with or without the will annexed limited during the lunacy of the executor or administrator(t). (*Williams on Executors*, 10th Edn., pp. 410-412). According to this Act it would seem that the probate or letters of administration already granted would have to be revoked and a new grant made to the committee of the lunatic, or if there be no committee to any fit person limited as above, (see *ill. viii*).

The grant will also be revoked if the person to whom the grant was made has *wilfully* and without reasonable cause omitted to exhibit an inventory or account, or has exhibited an inventory or account which is untrue in a material respect(u), or where the security furnished becomes worthless and an additional security is demanded; failure to furnish the additional security is a just cause for revocation(v).

Cases where revocation will not be Granted.—(1) A mere disagreement between the administrators is not a just cause for revocation(w).

(2) A mere failure to file accounts is not a sufficient cause for revocation. There must be wilful omission to do so(x).

(3) Mismanagement or mal-administration by an executor is not a just cause for revocation(y), but misappropriation of money and submission of false accounts is a ground for revocation(z).

(q) 23 C. W. N. 763; 47 Cal. 115.

(r) *In the goods of Ponsonby*, (1895) P. 287.

(s) *In the goods of Jenkins*, (1819) 3 Phillim. 38.

(t) *In the goods of Binckes*, 1 Curt. 286.

(u) *Goculdas v. Purshottam*, 4 Bom. L. R. 978; *Pram Chand v. Surendra Nath*, 9 C. W. N. 190.

(v) *Surendra Nath v. Amrita Lal*, 47 Cal. 115.

(w) *Gour Chandra v. Sarat Sundari*, 40 Cal. 30.

(x) *Gokuldas v. Purshottam*, 4 Bom. L. R. 979; *Bal Gangadhar Tilak v. Sakwarbai*, 26 Bom. 792.

(y) *Annoda v. Kallikrishna*, 24 Cal. 95.

(z) *Promotha v. Gowda Das*, A. I. R. (1938) C. 294.

(4) Immoral conduct of the executor or his unfitness or incompetency is not a just cause(a).

(5) A mere failure to issue citation to a person where the person is otherwise aware of the proceedings is not a just cause for revocation(b). In *Romanandi v. Kalavati*(c) it was established that if the Court in its discretion issues special citation its non-service renders the proceedings defective in substance and probate may be revoked. As a testamentary grant works in rem it is of utmost importance to give a wide publication to the proceedings.

(6) Mere ground of convenience or benefit to the estate will not be sufficient to revoke a grant(d).

(7) If administration is granted to a younger brother, the elder cannot have it revoked unless it was granted by surprise(e). Where a niece obtains administration, a nephew cannot get it revoked(f).

(8) If administration is granted to a creditor and afterwards a creditor for a larger amount appears, it shall not be revoked for him(g).

(9) If the will is proved in solemn form(h).

(10) When probate is granted in consequence of an arrangement between the parties and afterwards one of them applies for revocation on the allegation that the condition in which such consent had been given had not been complied, the probate will not be revoked, unless fraud or circumvention in obtaining probate is satisfactorily proved(i).

Procedure.—The power conferred by this sec. to revoke the grant is discretionary even if a case of “just cause” is made out and the procedure for an application for revocation is by petition under this section. As to whether a civil suit can lie to revoke the grant the decisions are conflicting but the recent and correct view adopted by the Courts is that no suit will lie to revoke the grant. In *Harris v. Spencer*(j) the Bombay High Court held that a civil suit can lie to revoke grant under this section. But the same Court has in *Narberham v. Jevallabh*(k) held that the correct procedure for revocation of the grant of probate is by a petition on the testamentary side of the Court and not by a suit on the Original Side. In this case a suit was filed on the Original Side to revoke probate but the suit was stayed and the plaintiff was ordered to apply by petition on the testamentary side to revoke probate. The Calcutta High Court has also held that no civil suit will lie to revoke grant on any ground and that the exclusive remedy is by an application to the Probate Court under this section and not by suit(l).

A petition to revoke grant must be made to the Court which granted the probate(m) and the application is by way of petition and not by notice of motion. On receipt of the petition, the Court shall give notice to the executor and all persons interested in the will or claiming to have any interest in the estate of the deceased. The executor will be the plaintiff and the applicant will be the defendant.

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| (a) <i>Mohun Dass v. Lutchmun Dass</i> , 6 Cal. 11 ;
<i>Hara Coomar v. Doorgamoni</i> , 21 Cal. 193. | (i) <i>Nicol v. Askew</i> , 2 Moo. P. C. 86. |
| (b) <i>Nistariny v. Brahmomoyi</i> , 18 Cal. 45 ;
<i>Goods of Bhuggobutty</i> , 27 Cal. 927. | (j) 35 Bom. L. R. 708. |
| (c) 55 I. R. 18. | (k) 35 Bom. L. R. 998 ; A. I. R. (1933) B. 469. |
| (d) <i>Goods of Looeday</i> , (1900) P. 154 ; In the
<i>Goods of Heslop</i> , 1 Robert 457. | (l) <i>Pannalal v. Hansraj</i> , A. I. R. (1940) C. 236 ;
<i>Kailash Chandra v. Nand Kumar</i> , A. I. R. (1944) C. 385. (See contra <i>No-been Chunder v. Bhobosoondari</i> , 6 Cal. 460. |
| (e) <i>Ayliff v. Ayliff</i> , 2 Keb. 812. | (m) <i>Raj Kishore v. Promodu Behari</i> , 22 Pat. 756 at p. 761. |
| (f) <i>Hill v. Bird</i> , Sty. 102. | |
| (g) <i>Dubois v. Trant</i> , 12 Mod. 438. | |
| (h) <i>Dina Bandhu v. Sarala Sundari</i> , (1940) 1 Cal. 33 at p. 47. | |

If the will is proved in common form, the executor will be required to prove it in solemn form in the presence of the objector. But a discretion is left to the Judge and where there had already been a full inquiry as to the genuineness of the will the Judge will have the right to accept the previous grant as *prima facie* evidence of the will and shift the onus on the defendant(n). The procedure relating to the revocation of grant under this section is the procedure under the Code of Civil Procedure, (see sec. 295). For the purpose of jurisdiction for the revocation of probate on the ground that the will is forged, the whole property mentioned in the petition for probate must be taken into consideration and not merely the value of the interest of the applicant in the property. There is no provision for a limited revocation(o).

The test of jurisdiction made use of in an application for grant of probate may also be applied under this section for revocation, viz., whether the deceased at the time of his death had his fixed place of abode or had some property within the jurisdiction of the District Judge(p).

In the proceedings for revocation not only the executor or administrator but other persons interested in supporting the will, such as purchaser from the executor, may appear and oppose the application(q).

When a grant of probate or letters of administration is revoked, the person to whom the grant was made shall forthwith deliver up the probate or letters of administration to the Court which made the grant, and if such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he becomes liable to a fine which may extend to one thousand rupees or to imprisonment of either description for a term which may extend to six months or with both under sec. 175 Indian Penal Code.

Evidence.—In an application for revocation of grant of probate the onus is on the applicant to displace the evidence regarding the execution and attestation of the will. To contradict such evidence, the evidence as to the improbability of the due execution must be clear and cogent and must approach very nearly to an impossibility(r).

Can Probate be challenged on the ground that the Will is a Forgery without Application for Revocation.—According to English law the grant of probate of a will has always been conclusive as to the validity of the will so far as the personal property is concerned and the Probate Court is the only Court where the validity of the will or the grant of probate can be impeached. As long as probate is unrevoked it is conclusive both in the Courts of law and equity, not only as to the appointment of executors, but as to the validity contents of the will so far as it extends to personal property. Since the passing of the Land Transfer Act, 1897, probate is also conclusive as to the validity of the will both as to real and personal property. This Act makes no distinction between real and personal property or as to the effect of probate of a will upon such property respectively. Sec. 273 enacts that "probate or letters of administration shall have effect over all the property and estate, moveable or immovable of the deceased, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him and shall afford full indemnity to all debtors paying their debts and all persons delivering such property to the person to whom such probate or letters of administration shall have been granted."

This section enacts the conclusiveness of the grant as to the representative title merely, but in this section there is no provision as in English law introduced

- (n) *Komoluchan v. Nilrutton*, 4 Cal. 360 at p 363. (q) *Kashi Chundra v. Gopi Krishna*, 19 Cal. 48.
 (o) *Ramgopal v. Jitunbai*, Ind. Rul. (1933) B. 110. (See also sec. 28 A Civil Courts Act XIV of 1869.) (r) *Chotey Narain v. Ratan Koer*, 22 I. A. 12; *Kristo v. Baidya Nath*, (1938) 2 Cal. 173.
 (p) *In re Hurro Lal*, 8 Cal. 570.

by the Probate Act of 1857 declaring a probate of will to be conclusive evidence in all Courts and in all proceedings of the validity and contents of the will itself. Sec. 264 of the Act enacts that the District Judge shall have jurisdiction in granting and revoking probate and letters of administration. Hence under this Act having regard to the definition of District Judge given in the sec.(2) the exclusive Courts which are constituted as Probate Courts are the High Courts in the presidency towns and the District Courts and not any other civil Court in the mofussil.

If probate is tendered in any civil Court as evidence of the validity and contents of the will, can it be challenged on the ground that the will is a forgery or that it was obtained by fraud or collusion? Sec. 44 of the Indian Evidence Act enacts that "any party to a suit or other proceedings may show that any judgment, order or decree which is relevant under sections 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The question, therefore, is whether probate is a decree within the meaning of sec. 44. The definition of probate given in this Act is "the copy of a will certified under the seal of competent jurisdiction with a grant of administration to the estate of the testator [see sec. 2 (f)]. In *Komollochun v. Nilruttun*, supra, it was held that the grant of probate was a decree of the Court which no other Court could set aside, except for fraud or want of jurisdiction. It was, however, pointed out in that case that, if it is suggested that the probate has been wrongly granted then the proper course is to apply to the District Judge who granted it to revoke the probate by an application under sec. 263. In *Bhagwandas v. D. D. Patel(s)*, however, Blackwell J., held that sec. 44 of the Evidence Act contains no limitation and would apply in any proceedings, civil or criminal. As regards the question that a judgment in a probate suit is a judgment in rem his Lordship observed that in India the law was different and that a decree in rem which is relevant under sec. 41 of the Evidence Act can be contested on the ground of fraud or collusion which does not go to the jurisdiction of the Court. "Apart from sec. 44 it is well established that a stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. It is also clear that having regard to sec. 44 it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside but that he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud." His Lordship in that case was dealing with a criminal application in which the party offering the evidence of forgery admitted the probate to be valid till repealed and admitted the title of the executor, but sought to show that the probate was obtained by fraud and the observations are obiter. This decision was considered by the Patna High Court in *Raj Kishore v. Promoda Behari(t)* in which Chatterji J., held that a grant of probate was not a decree and sec. 44 of the Evidence Act did not apply, that probate can only be revoked by the Court which granted it and that so long as the grant stood it could not be proved in a civil suit that the will was a forgery (see p. 760 of the Report). Commenting on the Bombay case his Lordship observed that as Blackwell J., rejected the application on merits the case could not be regarded as an authority on the question of applicability of sec. 44 to a case in the suit. The case of a probate which even though it might have been obtained by fraud, can be revoked only by the Court which granted it. It was held that the Subordinate Judge was right in disallowing the evidence that the will was a forgery. See also the observations of Wadia J., in *Narbheram v. Jewallabh(t¹)* that probate is conclusive evidence not only of the factum but also of the validity of the will and that unless the probate is revoked for "just cause" the Court cannot give a declaration that the will is null and void. In *Saroda v. Gobindo(u)*, it was observed that the action of a Probate Court of competent jurisdiction when it admits a will for

(s) A. I. R. (1940) B. 131.

(t) 22 Pat. 756.

(t¹) 35 Bom. L. R. 998.

(u) 12 C. L. J. 91.

probate or rejects it is in the nature of proceedings *in rem* and so long as the order remains in force it is conclusive as to the due execution and the validity of the will not only upon all parties who may be before the Court but also upon all other persons whatever in all proceedings arising out of the will or claims under or connected therewith. The conclusion to be drawn from these authorities is that probate is not a decree within the meaning of sec. 44 of the Evidence Act and as long as the grant is not revoked, the validity of the grant or the allegation that the will is a forgery will not be allowed in any proceedings.

Who can apply for revocation.—All persons who are entitled to contest the will may also apply for revocation of the grant. Persons seeking to revoke the grant of probate or of letters of administration must prove that they have an interest sufficient to entitle them to a *locus standi* in Court. It is not necessary that the person should have an interest in the estate at the time of the death of the testator. An interest acquired subsequent to the death of the testator by a purchaser or mortgagee of a part of the estate of the deceased is sufficient (v). It may be a very slight interest or may even be a bare possibility (w). A widow of a predeceased son having no interest in the estate has no *locus standi* (x). In the latest Privy Council case their Lordships of the Privy Council have held that "it cannot be said that only those persons who could be cited before the grant of probate who are the persons who could apply to revoke the probate. If a person complains that he is injured by the fraud committed in propounding a forged will, he is interested and can apply for revocation (y)."

An executor who has proved the will in Common Form cannot as such executor take proceedings to call in question the validity of that will and to apply for revocation of the probate (z). But an executor who is also a next-of-kin may in his capacity as next-of-kin apply for revocation (a). And if an administration has been properly granted, it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the estate, unless some strong ground for revocation be shown, e.g., discovery of a will (b).

The following have been held to have sufficient interest to entitle them to apply for revocation of grants.

(a) A reversioner is entitled to apply for revocation of letters of administration (c).

(b) A presumptive reversioner to the property with which a will deals has a sufficient interest in the property to entitle him to apply for revocation of probate (d).

(c) Creditors of an heir have *locus standi* to apply for revocation of probate if under the purported will the heir is deprived of the property (e). In this case it was also held that no appeal lies from the order of the Judge holding that a creditor has a *locus standi*. An attaching creditor can apply to have the grant revoked only on the ground that probate had been obtained in fraud of the creditors (f).

(v) *Gopes Chandra v. Sylhet Loan Co.*, 41 C. W. N. 120; *Dinabandhu v. Sarala Sundari*, A. I. R. (1940) C. 296.

(w) *Harris v. Spencer*, 35 Bom. L. R. 708; *Rahamtullah v. Rama Rau*, 17 Mad. 373.

(x) *Re Gobinda Chandra*, 17 C. W. N. 1141.

(y) *Sarala Sundari v. Dinbandhu*, 47 Bom. L. R. 571 (P. C.); A. I. R. (1944) P. C. 11.

(z) *In the goods of Chamberlain*, L. R. 1 P. & D. 816; *Sinath Ghose v. Mukundram*, 12 C. W. N. 573.

(a) *Williams v. Evans*, (1911) P. 175.

(b) *In the goods of Heslop*, 1 Robert, 437.

(c) *Bepin Behari v. Manoda Dasi*, 6 C. W. N. 912; *Khetramoni v. Shyma Churn*, 21 Cal. 539.

(d) *Nobon Chandra v. Bhotsoondari*, 6 Cal. 460; *In re Hurro Lal Shaha*, 8 Cal. 570; *Bepin Behari v. Monoda Dasi*, 6 C. W. N. 912; *Annanda Charan v. Ahul Chandra*, 23 C. W. N. 1045.

(e) *Lakhi Narain v. Multan Chand*, 16 C. W. N. 1099.

(f) *Nilmoni v. Umanath*, 10 Cal. 19; *Sarala Sundari v. Dina Bandhu Ray*, A. I. R. (1944) P. C. 11.

(d) A purchaser from the heir of a deceased person can, when a will is set up, apply for revocation of probate(g).

(c) An assignee of the part of the property of the testator has a *locus standi* to apply for revocation. He need not show that he had an interest at the death of the testator(h).

Who cannot Apply for Revocation.

(a) An executor under the first will whose appointment is revoked by the second will appointing new executor has no interest to apply for revocation(i).

(b) When the will is proved and probate granted in solemn form no one who has been cited or taken part in those proceedings or who was cognisant of them can afterwards come forward to have it revoked(j).

(c) Persons who have appeared as caveators and have been parties to contentious proceedings cannot afterwards apply for revocation. This is on the ground of *res-judicate*(k).

(d) A person who claims property adversely to and not through the testator cannot apply for revocation(l).

(e) A person who comes to Court after considerable delay and knowledge or acquiescence cannot apply for revocation(m).

Limitation.—There is no limitation period fixed for an application for revocation of a grant and the application may be made at any time(n). Mere delay in applying for revocation is immaterial if it does not lead to an inference of waiver(o). But long delay in making the application may debar the person in making such an application(p).

Appeal.—An order revoking or refusing to revoke a grant is appealable under sec. 299. An appeal also lies from an order rejecting the application of a person on the ground that he has no interest(q).

Effect of Revocation.—An executor after receiving notice of intended application for the revocation of probate, must stay his hands. He should not pay any legacy bequeathed under the will. If the legatee threaten him for payment, he should apply for directions from the Court. If without taking these precautions he pays any legacy he does so at his peril and on the subsequent revocation of probate he may be personally liable to make good the loss and sec. 297 will not protect him(r). See commentary to sec. 297, (Halsbury, Vol. 14, p. 215 and Hailsham Edition, Vol. 14, pp. 289-290).

Res Judicata.—A decision under this section against the applicant that he had no interest in the estate of the deceased was held as *res judicata* in *Panalal v. Hansraj*, *supra*. In *Yenkana v. Latchana*(s) it was held that no Court would allow a "just cause" already agitated and decided before the grant of probate to be again made the subject of an application for revocation under this section.

(g) *Muddan Mohan v. Kati Charan*, 20 Cal. 37.

(h) *Mokshdayini v. Karnadhar*, 19 C. W. N. 1108.

(i) *Pannalal v. Hansraj*, (1940) 1 Cal. 14; A. I. R. (1940) C. 237.

(j) *In re Pilamber*, 5 Bom. 638.

(k) *In re Bhobosondari*, 6 Cal. 460.

(l) *Ralph v. Hale*, 7 P. R. 1902.

(m) *Manorama v. Shivasundari*, 42 Cal. 480.

(n) *Durga v. Atul Chandra*, (1938) 1 Cal. 75; *Ramanandi v. Kalawati*, 7 Pat. 221 (P. C.); *In re Ishan Chunder*, 6 Cal. 707; *Maniklal v. Manekji*, 7 Bom. 213; *Tiluk*

ck Singh v. Parsotein, 22 Cal. 924; *Rahmat v. Abdul*, 34 Cal. 672; *Saroja v. Abhoy*, 41 Cal. 819; *Syama Charan v. Prafulla*, 19 C. W. N. 882.

(o) *Aswini Kumar v. Sukhaharan*, 35 C. W. N. 568; A. I. R. (1931) C. 717.

(p) *Haimbati v. Kunja Mohan*, 35 C. W. N. 387; A. I. R. (1931) C. 713.

(q) *Nalinchandra v. Nibaram*, 59 Cal. 1308.

(r) *Guardian Trust and Executor Co. v. Public Trustee of New Zealand*, (1942) W. N. 37.

(s) *Yenkana v. Latchana*, (1939) Rang. 601; A. I. R. (1939) R. 215.

In *Khirodamoyi v. Bagalasundari*(t) an application for revocation was made on the ground of mismanagement of the estate and was rejected later on a second application was made on the ground that the will was a forgery. It was held that second application was not barred.

CHAPTER IV.

Of the Practice in granting and revoking Probates and Letters of Administration.

Jurisdiction of District Judge in granting and revoking probates, etc.

264. (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

(2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina, or an exempted person, receive applications for probate or letters of administration until the Provincial Government has, by a notification in the provincial official Gazette, authorised it so to do.

[Clause 1 is sec. 235 of the Succession Act X of 1865 and sec. 51 of the Probate and Administration Act V of 1881. Clause 2 is sec. 2 of the Probate and Administration Act V of 1881. The words "and the Province of Burma" were omitted by the Government of India (adaptation of Indian Laws) Order, 1937, and the word "Local" is changed into "Provincial."]

The whole of chapter IV lays down the procedure for the grant of probate and letters of administration and when there is a positive enactment laid down by the Indian legislature, it is improper to resort to English practice in such cases. Such a practice is condemned by their Lordships of the Privy Council(u).

By this section the District Court is constituted the Probate Court in the mofussil and no other Court has jurisdiction in testamentary matters except the District Delegate whose functions are provided for in sec. 272. In the mofussil the District Judge alone has jurisdiction in testamentary matters.

As regards the jurisdiction of the District Court to entertain an application for the grant of probate or letters of administration, the same is laid down in sec. 270. This jurisdiction can only be exercised if the deceased had at the time of his death a fixed place of abode or any property, moveable or immoveable, within his jurisdiction.

High Court.—Having regard to the definition of "District Judge" given in sec. 2 (bb), by the Amending Act XVIII of 1929 the District Judge now includes the Judge of a High Court on its original jurisdiction side and the conflict is set at rest. Under section 300 the High Court has concurrent jurisdiction with the District Judge in all testamentary matters.

Sub-sec. (2).

The notifications referred to in this sub-sec. were published in the Gazette of India, 1881, Part II, p. 534; Calcutta Gazette, 20th April, 1881, Part I, p. 445; Punjab Gazette, 6th October, 1881, Part I, p. 483; Assam Gazette, 27th August, 1881, Part I, p. 337; Fort St. George Gazette, 30th April, 1889, Part I, p. 253; Central Provinces Gazette, 18th May, 1889, Part II, p. 91; Bombay Government

(t) 4 C. L. J. 492.

(u) *Ramanandi v. Kalawati*, 7 Pat. 221.

Gazette, 1st August, 1889. Part I, p. 643 ; North West Provinces and Oudh Gazette, 7th December, 1889. Part I. p. 511. These Notifications were issued under section 2, of the Probate and Administration Act which corresponds to the present sub-section.

This sub-section restricts the powers of the District Court to grant probate of the wills of Hindus, etc., coming under sec. 57 or letters of administration of the estate of Hindus, etc. Section 57 only refers to wills and codicils of Hindus, etc., made after the 1st day of September 1870, *i.e.*, to all the wills previously governed by the Hindu Wills Act and also to wills to which the Hindu Wills Act does not apply and made on or after 1st January 1927.

265. (1) The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe :

Power to appoint Delegate of District Judge to deal with non-contentious cases.

Provided that, in the case of High Courts not established by Royal Charter, such appointment shall not be without the previous sanction of the Provincial Government.

(2) Persons so appointed shall be called "District Delegates".

[This is sec. 235.1 of the Succession Act X of 1865 and sec. 52 of the Probate and Administration Act V of 1881 and sec. 2 of the District Delegates Act VI of 1881. The word "Local" is changed into "Provincial" by the Government of India (adaptation of Indian Laws) Order, 1937.]

Appointment of "District Delegates."

By this section power is given to the Chartered High Courts to appoint persons as "District Delegates" to act for the "District Judge." The appointment must be made from judicial officers. The jurisdiction of the "District Delegate" is to grant probate or letters of administration in *non-contentious* cases only. An application for revocation of a probate being a contentious matter, the District Delegate cannot decide it. He must return the application for being presented to the District Judge(r).

Proviso.

Proviso empowers High Courts other than the Chartered High Courts also to appoint District Delegates with the sanction of the Provincial Government.

266. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

District Judge's powers as to grant of probate and administration.

[This is sec. 236 of the Succession Act X of 1865 and sec. 53 of the Probate and Administration Act V of 1881.]

Powers of the District Judge.—(1) He shall have all the powers and authorities as are vested in him in relation to any civil suit.

Until the probate is or letters of administration are granted the District Judge within whose district any part of the property of the deceased is situate may

interfere and appoint an officer to take and keep possession of the property if requested to do so by any person claiming to be interested therein and in all other cases where the Judge considers that the property incurs any risk of loss or damage. He shall have a receiver appointed of the property(x).

267. (1) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person.

District Judge
may order person
to produce testa-
mentary papers.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

(3) Such person shall be bound to answer truly such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceedings shall be in the discretion of the judge.

[This is sec. 237 of the Succession Act X of 1865 and sec. 54 of the Probate and Administration Act V of 1881. The word "truly" is added in clause 3 to remove doubt.]

Powers of District Judge.

Before the passing of the Probate and Administration Act, the powers of the District Judge respecting grants were confined to cases of wills made on or after the 1st September 1870(w¹); but since the passing of that Act the District Courts have jurisdiction to entertain all applications for the grant of probate or letters of administration in respect of wills of Hindus made either before or after 1st September 1870(x).

Sub-section (1)

The District Judge may under this section order any person to produce the will into Court, if the will is in such person's possession, or under his control. The Court will pass an order under this section on an affidavit being filed stating that the will is in the possession or power of such and such person. A *sub-pœna* will then be issued to the person named to bring the will into Court. If the person served with the *sub-pœna* has not the will in his possession or under his control he should file an affidavit to that effect. If the will is not in such person's possession but he has knowledge of the same, the Judge may direct such person to attend the Court for being examined(y). He may be examined either in open Court or

(w) *Yeshwant v. Shankar*, 17 Bom. 388.

(w¹) *Lachmun Bharti v. Dukharan*, 6 C. L. R. 188.

(x) *Krishna, v. Rai Mohun*, 14 Cal. 37;
Krishna, v. Panchuran, 17 Cal. 272.

(y) *Dayabhai v. Damodardas*, 21 Bom. 75.

upon interrogatories. The Testamentary Registrar has no authority to issue *sub-pœna* to produce documents before him except of a testamentary character(z).

Sub-section (2)

Where there are reasonable grounds for believing that a person has knowledge of any testamentary paper the District Judge may issue a *sub-pœna* directing that person to attend before the Court on the date specified in the *sub-pœna* and such person shall be bound to attend and answer truly such questions as may be put to him by the Court concerning the will. The person required to attend is entitled to be paid his fees and to be represented by counsel. Even a solicitor holding a will for client has no privilege in the matter, and may be ordered to lodge it in Court, (Halsbury, Vol. 14, pp. 152-153 and Hailsham Edition, Vol. 14, p. 184.)

Sub-section (3)

According to this if the *sub-pœna* is disobeyed or the person required to answer truly the questions put to him, such disobedience is made punishable under the Indian Penal Code and not by contempt proceedings as in English practice.

Sub-section (4)

This sub-sec. gives to the District Judge discretion regarding the cost of such proceedings; but such discretion must be judicially exercised. In *Dayabhai v. Damodar*(a) the District Judge ordered the respondent to lodge the will in Court and directed that the appellant should pay half the costs of obtaining probate. That order was reversed by the High Court and costs were ordered to be paid out of the residuary estate primarily liable for the payment of such costs.

268. The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

Proceedings of District Judge's Court in relation to probate and administration.

[This is sec. 238 of the Succession Act X of 1865 and sec. 55 of the Probate and Administration Act V of 1881.]

Procedure.—The procedure to be observed in granting and revoking probate and letters of administration is that laid down in the Civil Procedure Code except as provided in sections 275 and 276, viz., that an application for probate or for letters of administration shall be made not by a plaint but by a petition, that on the petition being presented a summons is not to be issued but a citation is to be served on all the parties interested and that if a party wants to oppose the grant he must not file a written statement but he must enter a caveat. A caveat is a caution or warning giving notice to the Registrar not to issue any grant or to take any step without notice being first given to the party lodging the caveat. A caveat remains in force for eight days within which period an affidavit in support of the caveat must be filed. For form of caveat see schedule V. Mere citing a person in probate proceedings does not make him a defendant(b). It is only when the caveat is filed that the petition is numbered as a suit in which the petitioner becomes the plaintiff and the caveater becomes the defendant, see sec. 295(c). A caveat may be filed in anticipation of probate or letters of administration.

(x) *In the goods of Newton*, 8 B. L. R. 76.

(a) *21 Bom. 75.*

(b) *Saraji v. Abhay*, 41 Cal. 819.

(c) *Kalee Tara v. Nobin Chunder*, 21 W. R. 85; *Chatalal v. Kabubai*, 22 Bom. 261.

As soon as a caveat is entered and the affidavit in support of the caveat is filed the proceedings become contentious and the will must be proved before the Court(d). If the caveator sets up another will, revoking the will set up by the petitioner, the procedure to be adopted is that the caveator should be required to file a separate petition propounding the will set up by him. On such petition being filed there would be two separate petitions for grant of two different wills and the parties interested in opposing the grant would have to file respective caveats in each case. The two suits could then be heard together or consolidated(e). If the caveator's case is that the subsequent will which revoked the earlier one was itself revoked, it is not necessary for the caveator to propound the second will. In such a case it is enough for the caveator to prove that there was a will subsequent to the one propounded by the plaintiff and revoking the same. The revoked second will has only the effect as an instrument of revocation and the fact that it contained a clause revoking the earlier will can be proved by secondary evidence(f).

If no caveat is entered, the proceedings are non-contentious; and the petition for probate or letters of administration as non-contentious is dealt with in the High Courts by the Testamentary Registrar. As soon as it becomes contentious the petition is treated as a plaint and is numbered. The proceedings then take the form of a suit and are then governed as far as practicable by the Code of Civil Procedure(g). If the defendant caveator does not appear at the hearing in support of the caveat, it is not correct procedure to dismiss the caveat and leave to the Registrar the disposal of the petition. The proper procedure is to dismiss the caveat and order the issue of probate if the Court is satisfied that the petition is in order(h).

Compromise of Probate Proceedings

It may also be noted that no probate can be granted merely on the consent of the parties; a will must be proved(i). The Court cannot dispense with the proof of the will(j). If the proceedings become contentious and if evidence is led to prove the will, and thereafter some compromise is arrived at, the Court may grant probate and record the compromise, but the Court should not embody the terms of the compromise in the grant or have the same annexed in the form of a schedule to the grant(k). If the terms of the compromise are not carried, it will not be a ground for revocation of the grant(l). It must also be borne in mind that an agreement or compromise should not be made as to the genuineness or due execution of the will. It is against public policy if its effect is to exclude evidence in proof of the will(m). In *Judgish v. Upendra*(n) it was held that where there is a *bona fide* dispute about the validity of a will at a stage before an application for probate is made and the interested parties, the legatees under the will and those who could have got the estate on an intestacy, being doubtful about the success of their respective claims agree not to apply for probate, in consideration of avoiding the costs of litigation which may prove ruinous to the estate and for restoring peace, such an agreement is not bad as being against public policy. It may be observed that when a will is actually put before a Probate Court, the parties to the proceedings cannot say to the Court that the probate be granted without proof of the due execution of the will or probate refused without any evidence being led. The principle is well established that a probate or an order refusing probate operates as a judgment

(d) *Ghellaibhai v. Nandubai*, 21 Bom. 335.

(e) *Venidas v. Bai Champavati*, 53 Bom. 829.

(f) *Usharani v. Hemlata*, A. I. R. (1946) C. 40.

(g) *Ko Maung v. Daw Tok*, 6 Rang. 474.

(h) *Chotalal v. Bai Kabubai*, 22 Bom. 261.

(i) *Monmohini v. Banga Chandra*, 31 Cal. 357.

(j) *Raoji v. Vishnu*, 9 Bom. 241.

(k) *Bishunath v. Sarju Rai*, 53 All. 1000;

Kunja Lal v. Kailash Chandra, 14 C. W. N. 1008; *Surja Prasad v. Shyama Sunder*, 14 C. W. N. 967.

(l) *Nicol v. Askew*, 2 Moo. P. C. 88.

(m) *Gouri Shankar v. Hari Bhabini*, 41 C. W. N. 348.

(n) 48 C. W. N. 294.

in rem. Where a will is put before the Probate Court for proof the parties before the Court can, however, enter into an agreement which changes the term of the will and say that probate be granted. The effect of such an agreement will be the withdrawal of the objections to the proof of the will in consideration of the division of the estate in the manner agreed upon. In such a case the Probate Court will have to take evidence about the will and if it comes to the conclusion that the will is valid it must grant probate of the will as it stands and unmodified by the terms of the agreement, but should make the agreement arrived at between the parties an annexure to the decree. The parties agreeing would be bound to regulate their rights *inter se* according to the agreement and if any of them refuses the others will be entitled to bring a suit against the party in breach or may compel the executors to distribute the estate in accordance with that agreement by filing an application in the Probate Court under sec. 302 in cases in which that section applies. The agreement should be made an annexure to the decree granting probate whether it is arrived at before the probate proceedings or during the pendency thereof. It is not essential that the agreement can only be made varying the provisions of the will after the application for probate is made. In *Ghellaibhai v. Nandubai*(o), a question arose as to whether an executor against whose application for probate a caveat was entered could submit to arbitration the matter in dispute, i.e., the genuineness and due execution of the will; Farran, C. J., was strongly of opinion that he could not.

According to the English practice there are two methods for proving wills ; (1) by common form which corresponds to non-contentious proceedings and (2) by solemn form which corresponds to contentious proceedings.

The difference between a probate which has been granted in common form and a probate granted in solemn form is that the former is revocable and the latter, provided proper precautions have been taken, is irrevocable, except only in one case, that is, when a will of a later date is discovered after the decree is passed. The executor of the will proved in common form may at any time be compelled by a person having an interest to prove it *per testes* in solemn form. But where a party who is thus entitled to call in the probate and put the executor to proof of the will, chooses to let a long time elapse before he takes this step, he is not entitled to any indulgence at the hands of the Court(p), and the onus will lie heavily on him to prove that the will is not genuine(q). On the other hand if an unregistered will is sought to be proved after a lapse of 20 years, the burden of proving it in solemn form is cast upon the propounder and all manner of doubt and suspicion must be removed by him(r). A review may be allowed on a proper case being made. But when once probate in solemn form has been granted, no one who has been cited or taken part in the proceedings, or who was cognizant of them can afterwards seek to have it cancelled, but possibly a review might be allowed on a proper case being made(s).

The introduction of this practice of proving wills in common form or in solemn form in India came to be deprecated at the hands of their Lordships of the Privy Council in *Ramanandi v. Kalavati*(t) ; but with respect it is submitted that the difference is only in name. The expression used throughout this chapter is "Non-contentious" and "Contentious" proceedings". As regards non-contentious proceedings the grant is made by the Registrar in all the High Courts and by the District Judge or by the District Delegates in the mofussil under sec. 265. It is made on the *ex-parte* application of the petitioner after citation when there is no

(o) 21 Bom. 335. (see also *Jnanendra v. Jitendra*, 31 C. W. N. 108).

(p) *Brinda Chowdhrao v. Radhica Chowdhrao*, 11 Cal 492.

(q) *Kali Das v. Ishan Chander*, 31 Cal. 914, (P. C.).

(r) *Harimati Debi v. Anath Nath*, 69 C. L. J. 443 ; A. I. R. (1939) C. 535.

(s) *In re Pitamber Giridhar*, 5 Bom. 638 ; *In the goods of Bhuggobutty Dasi*, 27 Cal. 927. 7 Pat. 221, (P. C.).

(t) 7 Pat. 221, (P. C.).

opposition and this procedure exactly corresponds to the English practice of granting probate in common form. If there is opposition, the District Delegate has no power to issue the grant, (see sec. 286); in such cases the High Court and the District Judge (see sec. 300) alone are empowered to investigate the matter and if the will is proved to make the grant. This is what is called proving the will in solemn form. This practice was recognised by the Privy Council in *Kali Das v. Ishan Chunder(u)*.

Application of Civil Procedure Code.

Order XI was applied to probate proceedings in *Anila bala v. Rajendranath(v)*. This order relates to discovery inspection and interrogatories.

Order XVI, r. 20 was applied in *Ravji v. Vishnu(w)*, when the caveator refused to answer a question.

Order XXI and sec. 47 apply to probate proceedings and a decree directing the issue of probate can be executed in the manner of any other decree(x).

Order XXXIII was applied in *In the matter of the will of Darubai(y)*, and the executor who was not in possession of the property of the testator and who had no means was allowed to file petition *in forma pauperis*.

Order XXXIX. Probate Court is competent to grant temporary injunction(z); but the proper procedure is to appoint an administrator *pendente lite*.

Order XXXIX, r. 7. Probate Court may make an order for inventory of the property(a).

Order XL. A receiver may be appointed in a testamentary suit(b).

The judgment of a Probate Court granting or refusing probate is *judgment in rem*. Principles of *res judicata* apply to probate proceedings(c).

Appeal.—Under sec. 299 every order made by the District Judge under this chapter is appealable to the High Court. An order granting or refusing letters or probate is appealable(d).

269. (1) Until probate is granted of the will of a deceased

When and how District Judge to interfere for protection of property.

person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor

(u) 31 Cal. 914.

(v) 43 Cal. 300.

(w) 9 Bom. 241.

(x) *Brij Coomaree v. Ramrick*, 5 C. W. N. 781.

(y) 18 Bom. 237.

(z) *Nirodebaran v. Chumalkarini*, 19 C. W. N. 205.

(a) *Giribala v. Prokash Chandra*, 49 C. L. J.

484.

(b) *Yeshwant v. Shankar*, 17 Bom. 888; *Administrator General v. Prem Lall*, 22 Cal. 1011 (P. C.).

(c) *Kalpada v. Durjapada*, 51 C. L. J. 142; *Ramani v. Kumud*, 14 C. W. N. 924.

(d) *Subhan Khan v. Mohamed Eusoof*, (1933) Rang. 72.

shall it apply to any part of the property of an Indian Christian who has died intestate.

[Clause 1 of this section is sec. 239 of the Succession Act X of 1865 and sec. 3 of the Native Christians Act VII of 1901].

Under sub-sec. 1 until the probate is or letters of administration are granted, the District Judge within whose district any part of the property of the deceased is situate may interfere and appoint an officer to take and keep possession of the property if requested to do so by a person interested therein. This section gives very wide powers to the District Judge. He can pass any order which he considers most effective. He can appoint a person already in possession of the property to keep such possession until an administrator is duly appointed(e).

The District Judge has power to make orders under certain circumstances for the protection of the property where the Judge considers that the property incurs any risk of loss or damage so long as no person has been appointed administrator or a grant of probate made. He may have a receiver appointed of the property(f), but if once a grant is made the District Court has no power to act under this section; the power vests in the High Court by virtue of sec. 302(g).

By sub-sec. 2 this section is not made applicable to Hindus, Muhammadans and Indian Christians. But its non-application does not in any way curtail the powers of the District Judge(h).

270. Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable within the jurisdiction of the Judge.

When probate or administration may be granted by District Judge.

[This is sec. 240 of the Succession Act X of 1865 and sec. 56 of the Probate and Administration Act V of 1881.]

Jurisdiction of the District Judge to grant Probate and Letters of Administration.—(1) When the deceased had a fixed place of abode within the jurisdiction of the District Judge(i). The expression “fixed place of abode” used in this section is equivalent to reside and the word “reside” or “residence” denotes the place where an individual eats, drinks and sleeps, or where his family or servants eat, drink and sleep(j). The residence need not be of a permanent nature(k).

(2) If the deceased has no fixed place of abode but if he has any property moveable or immoveable within the District Judge's jurisdiction. If some property of the testator even though of very small value is admittedly situate in the District A, though by far the larger and more valuable part of it is in District B, the District Judge of District A has jurisdiction to grant letters of administration with the will annexed. Sec. 271 is merely discretionary; it does not take away the jurisdiction conferred by this section(l). In *Ravji v. Vishnu(m)*, the District Judge of Thana

(e) *Magdelene v. P. F. Rego*, A. I. R. (1938) Nag. 173; (1938) Ind Rul. Nag. 230.

(f) *Yeshwant v. Shankar*, 17 Bom. 388.

(g) *Winsor v. Winsor*, 44 Bom. 682.

(h) *Yeshwant v. Shankar*, 17 Bom. 388; *Hafisabai v. Kani*, 19 Bom. 88.

(i) *Ugerchand v. Surajmal*, 2 Bom. L. R. 634.

(j) *Kumud Nath v. Jotindra Nath*, 38 Cal. 394; *Govind v. Anand*, A. I. R. (1928) Nag. 145.

(k) *In the goods of Mohendra*, 6 C. W. N. 377.

(l) *Asubhiyakuer v. Debi Prakash*, A. I. R. (1944) P. C. 29.

(m) 9 Bom. 241.

was held to have jurisdiction to grant probate of a will of a Hindu woman who died possessed of property in Thana. The place where the will is executed is immaterial. In this case the will was executed in Bombay. A District Judge, has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the District Judge(*n*).

But a District Judge cannot grant administration to the estate of a person who had neither, at the time of his death a fixed place of abode nor any property within his district(*o*).

The High Court has no jurisdiction to grant probate or letters of administration if the deceased did not dwell nor left property within its jurisdiction(*p*).

The existence of any property is sufficient to confer jurisdiction(*q*). If only a part of the property of the deceased is within the jurisdiction and if the deceased had his fixed place of abode also within the jurisdiction the Court can grant probate or letters of administration(*r*). But if the deceased had no fixed place of abode within the jurisdiction of the District Judge but has left some property within his jurisdiction then sec. 271 will apply and if it appears to the District Judge that the bulk of the property of the deceased is situate elsewhere and that the application can be disposed of more conveniently or justly in another district, he may refuse the application(*s*).

271. When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

Disposal of application made to Judge of District in which deceased had no fixed abode.

[This is sec. 241 of the Succession Act X of 1865 and sec. 57 of the Probate and Administration Act V of 1881.]

In case of concurrent jurisdiction in a probate action it is very necessary to avoid a conflict. In determining whether the Court should have regard and defer to a jurisdiction with which it may come into conflict or whether the Court can finally expect that other jurisdiction to defer to it, two points should be considered, priority in time and extent of relief asked for or obtainable in other jurisdiction.

The discretion given by this section is to be exercised only when the deceased had no fixed place of abode at the time of his death. The jurisdiction of the District Judge is then confined to the property of the deceased. If the deceased has property in more than one district and if the District Judge is of opinion that the petition can be more conveniently disposed of by another District Judge, he may refer the applicant to that other Court or he may make the grant limited to the property within his district(*t*). In *Muncha v. Ganga*(*u*), the deceased died in Calcutta; he left property in Calcutta and in Bombay. Application for probate of his will was made to the District Judge of Surat on the ground that the deceased

(*n*) *Bhaurao v. Lakshmidai*, 20 Bom. 607.

(*o*) *Fardunji v. Navajbai*, 17 Bom. 689.

(*p*) *In re Rose Learmouth*, 24 Mad. 120.

(*q*) *In re Mahendranarain*, 5 C. W. N. 380.

(*r*) *Lal Singh v. Kishen Devi*, A. I. R. (1929)

L. 72.

(*s*) *Mancha v. Ganga*, 1 Bom. L. R. 666.

(*t*) *In the goods of Rose Anne D'Silva*, 25 All. 355.

(*u*) 1 Bom. L. R. 166.

had left property in Surat. It was found that the deceased had left some earthen pots and other property of trifling value in Surat. Petition was refused as it could be conveniently disposed of by other Courts.

272. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

[This is sec. 241-A of the Succession Act X of 1865, sec. 58 of the Probate and Administration Act V of 1881 and sec. 3 of the District Delegates Act VI of 1881.]

Jurisdiction of the District Delegate to grant probate or Letters of Administration.—The jurisdiction of the District Delegate is restricted by this section in two respects—

(1) The deceased at the time of his death had a fixed place of abode within the jurisdiction of the District Delegate.

(2) And the proceedings are non-contentious. By sec. 286 it is provided that the District Delegate shall not make a grant when there is contention.

The existence of property within the jurisdiction of the District Delegate does not give jurisdiction to him if the deceased had no fixed abode within his jurisdiction.

273. Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted :

Conclusiveness of probate or letters of administration.

Provided that probates and letters of administration granted—

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the province does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

§ The proviso to this section shall apply in British India after the separation of Burma and Aden from India to probates and letters of administration granted in

Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date."

[This is sec. 242 of the *Succession Act X of 1865* and sec. 59 of the *Probate and Administration Act V of 1881*. The italic portion was inserted as per Government of India (adaptation of Indian Laws) order 1937. The date of separation is 1st April, 1937.]

By the Baroda Cantonment (Application of Laws) Order, 1943 which made this Act Applicable to the Baroda Cantonment in the proviso to this section after the word "granted" the words "under the Act in force in British India or under the Act as applied to any area under the administration of the Crown Representative" are inserted, and for the words "beyond the limits of the province" the words "in the Baroda Cantonment" are substituted and for the words "have like effect throughout the whole of British India" the words "have the same effect as grants under this Act" are substituted [See Gazette of India Part 1A d. 14th August 1943 p. 10.

Conclusiveness of Probate and Letters of Administration.—As to the effect and consequences, of grant see *supra* sec. 227, pp. 419-423. The combined effect of sec. 227 and of this section is *first* that the property of the deceased vests in the executor or administrator as from the day of the death of the deceased and so long as the grant stands the executor or administrator is the legal representative of the deceased(v). Probate is conclusive as to the representative title of the executor and the right of the executor to represent the estate and as to the due execution of the will but not as to the genuineness of the will or whether it was obtained fraudulently(w). Letters of administration are conclusive evidence of the intestacy of the deceased(x). *Secondly* it is conclusive against all debtors and affords full indemnity to them for paying their debts and to all persons delivering the property of the deceased to such legal representative even though it may turn out afterwards that the probate or letters were fraudulently obtained, (see sec. 297(y)). But a banker knowing the fiduciary character of a customer, pays him the moneys deposited with the bank for purposes inconsistent with his fiduciary character is not entitled to the indemnity afforded by this section(z). If a suit is to be filed by the creditors in respect of the estate, the executors or administrators are the only necessary parties and not the heirs(a). In an administration suit it is only the executors who have proved the will are the necessary parties and the legatees can either be brought on the record or notice may be given to them at the time of the reference to commissioner if their interests are likely to be affected(b). Executors who have not proved the will need not be made parties, (O. 31 r. 2, Code of Civil Procedure). As regards beneficiaries also they are not necessary parties; but under O. 31 r. 1, the Court may if it thinks fit order them to be made parties.

Proviso.—The effect of the proviso is to make probate or letters of administration in certain cases operative throughout the whole of British India. This proviso applies to persons governed by this Act. In case of persons not governed by this Act *e.g.*, Cutchi Memons probate cannot be granted to have effect throughout British India(c).

Procedure when the Grant is to have Effect throughout the whole of British India.—Ordinarily the grant of probate or letters of administration operates only on the property of the deceased throughout the province in which the same is or are granted, (see Bombay High Court Rule 610). An all India grant can be made

(1) by a High Court, (see Bombay High Court Rule 611). The High Court can only exercise jurisdiction under this section if there is some

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| (v) <i>Mirza Kurrutulain v. Pearsa Sahab</i> , 32 I. A. 244, 33 Cal. 116. | 165. |
| (w) <i>Bhagwandas v. D. D. Patel & Co.</i> , A. I. R. (1940) B. 131. | (z) <i>Imperial Bank v. Krishnamurti</i> , Ind. Rul. (1933) M. 411; A. I. R. (1933) M. 628. |
| (x) <i>Charu Chandra v. Nahush Chandra</i> , 50 Cal. 49 at p. 57. | (a) <i>Matangini v. Chooneymoney</i> , 22 Cal. 903. |
| (y) <i>Ramchandra v. Ramabai</i> , 39 Bom. L. R. | (b) <i>Pramaihanath v. Suprakash</i> , 58 Cal. 77; <i>Satya Prashad v. Motilal</i> , 27 Cal. 683. |
| | (c) <i>In re Haji Ismail</i> , 6 Bom. 452. |

property within its jurisdiction either original or appellate. In *In the matter of Rose Learmouth*(d), it was held that the Madras High Court had no jurisdiction to grant probate of the will of a testator who did not reside and who had no assets within the Presidency of Madras, and

- (2) by a District Judge when the deceased had a fixed place of abode within his jurisdiction and the Judge certifies that the value of the property beyond the province does not exceed Rs. 10,000. If the value of the property beyond the jurisdiction of the District Judge exceeds Rs. 10,000 then the District Judge has no jurisdiction. The procedure to be then adopted is to apply for grant limited to the property within the jurisdiction. If another application is then made for grant of letters of administration in respect of the whole property left by the deceased to the High Court then the High Court is seized of the matter, although the application to the High Court may be subsequent to the application to the District Court and the application made to the High Court will not be stayed under sec. 10 of the Code of Civil Procedure. The High Court has also power to restrain by injunction the petitioner to the District Court who is not resident within its jurisdiction from proceeding with his previously instituted petition, if such party has entered a caveat in the High Court in the petition instituted by another person for the grant of letters of administration to the whole estate, if the caveat is filed without protest with an affidavit in support of the caveat(e).

When the grant is limited to one province and additional property is discovered in another province, the Bombay High Court Rule 643 allows amendment of the grant to extend to British India on payment of additional probate duty.

The power given under the proviso for an all India grant is discretionary, [see sec. 279(2)]. It has been held in *Namberumal v. Veeraperumal*(f), that in the case of wills executed outside Madras probate may be taken only of the immoveable property situate within Madras.

Zanzibar is district in the Province of Bombay. It was held in *Macleod v. Consul General of Zanzibar*(g) that Probate granted by Consul General of Zanzibar is conclusive against all debtors and holders of property of the testator in the Presidency of Bombay.

274. (1) Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court, or District Judge shall send a certificate thereof to the following Courts, namely :—

Transmission to High Courts of certificate of grants under proviso to section 273.

- (a) when the grant has been made by a High Court, to each of the other High Courts ;
- (b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(d) 24 Mad. 120.

(e) *In the goods of Lillian Singh*, (1942) 2 Cal. 194; A. I. R. (1943) C. 19.

(f) 59 M. L. J. 596.

(g) 8 Bom. L. R. 725.

(2) Every certificate referred to in sub-section (1) shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.

[This is sec. 242-A of the Succession Act X of 1865 and sec. 60 of the Probate and Administration Act V of 1881.]

This section lays down the rule of procedure for the guidance of the Court when the grant is throughout the whole of British India grant. When such a grant is issued by a High Court it shall send a certificate to the other High Courts. When the grant is made by a District Judge, he shall send the certificate to the High Court to which he is subordinate and to the other High Courts. The form of the certificate is given in Schedule IV.

275. The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate or administration ; and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

Conclusiveness of application for probate or administration if properly made and verified.

[This is sec. 243 of the Succession Act X of 1865 and sec. 61 of the Probate and Administration Act V of 1881.]

Conclusiveness of Grant.

If a grant is made on a petition duly verified, the contents of the petition are accepted as correct and the essential contents are that the deceased at the time of his death resided within the province or left property there and the relationship of the petitioner. If any one desires to challenge these statements, he must file a caveat before the grant is issued. If he wants to challenge these statements after the grant is made, he must take steps to revoke the grant on the ground of fraud upon Court and until that is done, according to this section the statements are deemed to be conclusive(h).

If the petition contains false statements, the petitioner is liable to be punished for giving or fabricating false evidence, (see sec. 282).

276. (1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in

Petition for probate.

(h) *In the goods of Rose Anne D'Silva*, 25 All. 355 ; *In the goods of Sassoon*, 21 Bom. 673.

sections 237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator's death,
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,—

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and
- (b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

[This is sec. 244 of the Succession Act X of 1865 and sec. 62 of the Probate and Administration Act V of 1881.]

Sub-Secs. (1) & (2)

Contents of the Petition for Probate.—The petition for probate shall be in the English language or in the language of the Court and must contain the following :—

(1) The will must be annexed to the petition. The will must be proved and the Court must be satisfied that the will has been duly executed, and attested(i). If the will is not in English or in the language of the Court, its official translation must accompany (sec. 277). Although this section requires that the petition must be accompanied by the will, but if the will is not in the possession of the applicant it should be stated in whose possession it is and the Court will summon that person to produce it(j).

(2) Time of the testator's death.

(3) The writing annexed is the last will and that it was duly executed.

(4) The amount and value of assets which are likely to come to the petitioner's hands and the value thereof for the purposes of probate duty(k). All the assets likely to come whether within or without British India must be mentioned. Only the properties situate in British India need be mentioned. If some property is in

(i) *Ameer Chand v. Mohanund Bibi*, 6 C. L. 3, 487.

(j) *Dev Ditta v. Devi Ditta*, A. I. R. (1939) L.

(k) *Kuppayammal v. Ammani Ammal*, 22 Mad. 845; *Khubchand v. Motilbai*, A. I. R. (1936) S. 150; 165 I. C. 202.

the Native State that property should not be included in the schedule to the petition and probate duty is payable only on the assets which at the date of the testator's death are in British India(l).

(5) The petitioner is the executor named in the will. Where a member of the firm is appointed executor without name, the person who applies for probate must prove that he was a member of the firm both at the date of the will and at the time of the death of the testator(m).

(6) The deceased had his fixed place of abode or some property moveable or immoveable within the jurisdiction of the District Judge, when the application is to the District Judge.

Under this section (unlike sec. 278) in a petition for probate it is not necessary to mention the names of the next of kin of the testator but in practice they are required to be stated in the petition.

(7) When the application is to a District Delegate, that the deceased resided within the jurisdiction of such Delegate.

(8) When the application is made for probate to have effect throughout the whole of British India, whether any application for probate or for letters of administration was made to any other Court and if so, with what result.

The petition must be verified by the petitioner and by at least one of the attesting witnesses to the will when procurable, (see sec. 281). In practice the attesting witness makes an affidavit. The petition for probate must be accompanied by the executor's oath, (see Bombay High Court Rule 603).

Where two or more persons apply it is not permissible to grant probate or letters of administration in fractions(n).

If the petition is for probate of a nuncupative or oral will, then in addition to the statements mentioned above, the petition should set out either in the petition itself or by a separate affidavit the contents of the oral will to be propounded and when and to whom the same were made(o). Such petition is disposed of by the Judge and not by the Registrar, (see rule 608 of the Bombay High Court Rules).

Sub-Sec. (3)

A petition for probate should not be refused on the ground that there are no assets to be administered(p). But in the case of a petition for letters of administration it is the duty of the Court before granting the letters of administration to see whether there is any estate left to be administered(q).

Application in forma pauperis.—Where an executor is not in possession of the property of his testator and cannot get possession of it and where he has not himself the means of paying the necessary fees, he may be allowed to petition, and if entitled thereto to obtain probate *in forma pauperis*(r).

The order of the District Judge granting or refusing probate under this section is a decree(s).

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| (l) <i>In re Ezekiel</i> , 21 Bom. 139 at 152; <i>Lal Singh v. Kishen Devi</i> , A. I. R. (1929) L. 72. | (p) L. J. 711. |
| (m) <i>In the goods of George Nath</i> , 29 C. W. N. 373; A. I. R. (1925) C. 606. | (q) <i>Adwait v. Krishnadhane</i> , 12 C. W. N. 129. |
| (n) <i>Abdul Gaffur v. Jayarabai</i> , 31 Bom. L. R. 1093. | (r) <i>Lalit Chandra v. Baikuntha</i> , 14 C. W. N. 463. |
| (o) <i>In re the Will of Haji Mahomed Abba</i> , 24 Bom. 8; <i>Pitani Lal v. Kallu Ram</i> , 29 A. | (s) <i>In the matter of the Will of Dawrubai</i> , 18 Bom. 237. |
| | (t) <i>Miss Eva Mountstephens v. Mr. Hunter</i> , 35 All. 448. |

Limitation.—Under the Indian Limitation Act No. IX of 1908 there is no period prescribed within which a petition for probate or for letters of administration should be made after the deceased's death(*t*). It may therefore be presented at any time after the death of the deceased, even many years after the death(*u*). But delay in applying for probate naturally gives rise to some suspicion. If the application is made more than three years after the death, the petitioner must state the reason of the delay in his petition(*v*). (Rule 609 Bombay High Court Rules). Long delay in making such application is a circumstance which may be taken into account in determining the genuineness of the will, but is not a ground for refusing probate(*w*).

Where a second or subsequent petitioner comes after considerable delay and if knowledge or acquiescence in the grant is proved on his part, the Court will not allow him to reopen the grant unless he offers some reasonable and true explanation of the delay(*x*).

Under sec. 293 in case of an application for probate seven clear days must be allowed to pass after the death of the testator before an application can be entertained and 14 days must pass after the death of the testator or intestate for an application for letters of administration.

277. In cases wherein the will, copy or draft, is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft, is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely :—

In what cases translation of will to be annexed to petition.

Verification of translation by person other than Court translator.

“ I (A.B.) do declare that I read and perfectly understand the language and character of the original and that the above is a true and accurate translation thereof.”

[This is sec. 245 of the Succession Act X of 1865 and sec. 63 of the Probate and Administration Act V of 1881.]

When the will is in a vernacular language, the practice is to get it officially translated by the translators appointed by the Court and after the translation is ready to annex the original will as exhibit A to the petition and the translation as exhibit B, (see Bombay High Court Rule 608). If the will is in a language for which no translator is appointed by the Court, then the will may be translated as best as possible by any person acquainted with the language of the will and also knowing English and his verification shall be taken to such translation in the form given in this section.

- (*t*) *Manekbai v. Manekji*, 7 Bom. 218; *Re Ishan Chunder Roy*, 6 Cal. 707; *Kashi Chandra v. Gopi Krishna*, 19 Cal. 48.
- (*u*) *Gnanamuthu v. Vana Koilpillai*, 17 Mad. 870.
- (*v*) *Masindra v. Mahalaxmi Bank*, A. I. R. 1945 P. C. 105; *Binodini v. Hriday Nath*, 22 C. W. N. 424; *Kalidas v. Ishan Chunder*,

- 9 C. W. N. 49 (P. C.).
- (*w*) *Durga v. Atul Chandra*, (1938) 1 Cal. 75.
- (*x*) *Manorama v. Shiva Sundari*, 42 Cal. 480; *Binodini v. Hriday Nath*, 22 C. W. N. 424; *Kunja Lal v. Kailash Chandra*, 14 C. W. N. 1068; *Radhashyam v. Ranga Sundari*, 24 C. W. N. 541.

Petition
for
letters of adminis-
tration.

278. (1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—

- (a) the time and place of the deceased's death ;
- (b) the family or other relatives of the deceased, and their respective residences ;
- (c) the right in which the petitioner claims ;
- (d) the amount of assets which are likely to come to the petitioner's hands ;
- (e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge ; and
- (f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

[This is sec. 246 of the Succession Act X of 1865 and sec. 64 of the Probate and Administration Act V of 1881.]

Contents of the Petition for Letters of Administration

- (1) Time and place of the deceased's death.
- (2) That no will has been found though diligent search made.
- (3) Family or relatives of the deceased and their respective residences.
- (4) The right of the petitioner to obtain letters of administration.
- (5) That the deceased left some property within the jurisdiction of the District Judge or District Delegate. It is not necessary for the Probate Court to decide what assets are likely to come to the hands of the petitioner, but it is the duty of the Court to see whether there is any estate to be administered. If there is no estate remaining to be administered the grant must be refused(y). If more than one petition is presented by different parties for the administration of the same estate, the practice of the Bombay High Court is to consolidate the petitions and if both the petitioners are equally entitled to the grant, to issue a joint grant(z).
- (6) The amount of assets which are likely to come to the petitioner's hands and the value thereof for the purpose of administration duty.
- (7) When the application is to the District Delegate that the deceased at the time of his death resided within his jurisdiction.
- (8) When the application is made for letters of administration to have effect throughout the whole of British India, whether an application for letters of administration was made to any Court, and if so, with what result, (see sec. 279).

(y) *Lalit Chandra v. Baikuntha*, 14 C. W. N. 463.

(z) See the Petition in *Re Kavasji K. Patuck*, dated the 7th September 1896.

If after the grant of letters of administration by the District Judge other property outside his jurisdiction is found, the proper course is to apply to the District Judge to revoke the grant and after obtaining the revocation to apply to the High Court for a new grant(a).

279. (1) Every person applying to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid.

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same.

[This is sec. 246-A of the Succession Act X of 1865 and sec. 65 of the Probate and Administration Act V of 1881.]

An all India grant is made under sec. 273 only when no application has been made in any other Court for the probate of the same will or for letters of administration to the same estate. This section, therefore, requires that the petitioner for an all British India grant must state in the petition that no such application has been made. If any such application has been made, the petitioner must state to which Court it was made, by whom it was made and the result of such application.

280. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely :—

“I (A. B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief.”

[This is sec. 247 of the Succession Act X of 1865 and sec. 66 of the Probate and Administration Act V of 1881.]

Verification of Petition.—The Bombay High Court Rule 613 provides that the petition for probate or letters of administration shall be subscribed by the petitioner and his attorney (if any) and shall be verified by the petitioner in the manner set out above.

The Administrator-General is not required to verify the petition otherwise than by his signature under the Administrator Generals Act(b).

(a) *In the goods of Rose Anne D'Silva*, 25 All. 355. (b) *In the goods of Avdall*, 26 Cal. 404.

281. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely :—

Verification of
petition for pro-
bate, by one witness
to will.

“I (C.D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence).

[This is sec. 218 of the Succession Act X of 1865 and sec. 67 of the Probate and Administration Act V of 1881.]

Affidavit of Attesting Witness.—In the case of an application for probate, this section requires that the petition shall be accompanied by the affidavit of one of the attesting witnesses if living. If both the witnesses are dead resort must be had to other person who may have been present at the execution. The Bombay High Court Rule 603 is also to the same effect. By rule 615 it is provided that if no affidavit of an attesting witness is procurable, an affidavit shall be procured (if possible) from some other person who may have been present at the execution of the will; if no affidavit of any such person can be obtained, evidence by affidavit must be produced of that fact and of the handwritings of the deceased and of attesting witnesses.

This affidavit is required to prove the due execution of the will. This affidavit is deemed sufficient in all non-contentious matters and probate is granted if the Registrar is satisfied. In case of doubt, the Registrar may refer the matter to the Testamentary Judge. This is called proving the will in common form(c).

If the petition becomes contentious, the attesting witnesses are examined in open Court and cross examined by the caveator. The party propounding a will is bound to call one of the attesting witnesses to prove execution even if evidence of execution is otherwise forthcoming. The attesting witness is the witness of the Court and not of the party calling him, and the party calling him can also cross examine him on any part of his evidence tending to contravene due execution of the will(d), (Halsbury, Vol. 14, p. 177 and Hailsham Edn., Vol. 14, p. 226.) This is called proving the will in solemn form or *per testes*.

282. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code.

Punishment for
false averment in
petition or declara-
tion.

[This is sec. 249 of the Succession Act X of 1865 and sec. 68 of the Probate and Administration Act V of 1881.]

Prosecution under this section can only be started if any statement in the petition is made with the knowledge or belief that it is false, and then also only on the complaint of the Court before which it was made and not by a private complaint(e).

(c) *Chotalal v. Kabubari*, 22 Bom. 261.

(d) *Oakes v. Uzzell*, (1932) p. 19.

(e) *Baldeo v. Deputy Inspector General*, 51 Cal. 682.

Powers of District Judge.

283. (1) In all cases the District Judge or District Delegate may, if he thinks proper,—

- (a) examine the petitioner in person, upon oath ;
- (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be ;
- (c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself and shall certify such publication to the District Judge who issued the citation.

[This is sec. 250 of the Succession Act X of 1865 and sec. 69 of the Probate and Administration Act V of 1881.]

Sub-Sec. (1) (a)

Examine the Petitioner.—In the High Courts in all non-contentious proceedings, the verification of the petitioner is considered sufficient, and the grant is made by the Registrar without examining the petitioner in person. In the District Courts the practice is to examine the petitioner by the Judge.

Sub-sec. (1) (b)

Evidence as to due Execution of the Will.—Under sec. 281 the affidavit of an attesting witness is required in cases of petition for probate. If such evidence is not available, the Court will require due execution to be proved. The evidence required is laid down in sections 78 to 81 of the Indian Evidence Act. Under the amended section 68 of the Evidence Act (XXXI of 1926, sec. 2) in the case of registered wills it is not necessary to call an attesting witness, unless its execution is specifically denied.

Evidence as to the right of the Petitioner to the Letters of Administration.—In case of intestacy, the petitioner must show that he has the right to apply for letters of administration, if the petitioner has the prior right. If the petitioner has the inferior right, he must either procure the consent of the person entitled to prior right or state that the person entitled to prior right has failed or neglected to apply. A citation will then be issued.

Sub-sec. (1) (c)

Citation under this section is discretionary(f). Citation under this section is to be issued to all persons claiming an interest in the estate. A person who dis-

(f) *Mitra v. Spencer*, 35 Bom. L. R. 708; *Shyama Charan v. Prafulla*, 19 C. W. N. 882.

claims the property disposed of by the will is not entitled to be served with citation(g).

In every case in which probate of the will of a Hindu is applied for a special citation must be served on those persons whose interests are directly affected by the will(h). This section gives to the District Judge full discretion as to issuing of citation. Ordinarily citations are dispensed with in the case of Parsis, Christians and Europeans but different consideration arises when the testator is a Hindu(i). Rule 624 of the Bombay High Court Rules is also to the same effect. Under that rule the citation is to be published in newspapers in case of petition for probate or letters of administration of a Hindu or Muhammadan.

Sub-sec. (2)

Service of Citation.—Sub-section 2 provides for the mode of service of citation. Ordinarily a citation is to be served personally through the bailiff of the Court and in case of special citation it must be served personally. In case of discretionary citation it is usually inserted in local papers inviting all persons interested in the estate to come and see the proceedings. If the person required to be served is a minor the practice is to serve the citation on the natural guardian of the minor. But if the applicant for probate is himself the guardian of the minor or where the natural guardian is under the influence or care of the propounder of the will, an independent *guardian-ad-litem* should be appointed for receiving the citation and the service should be effected on him. It is not necessary that in every case a *guardian-ad-litem* should be appointed(j). In the absence of such service it will be open to the minor on attaining majority within the period of limitation to institute proceedings for the revocation of the grant(k).

Mere citing a person in probate proceedings does not make him a defendant, unless the caveat is filed(l). Absence of citation under this section does not invalidate the grant(m).

Sub-sec. (3)

Under this sub-section a general citation is compulsory(n).

284. (1) Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District

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| <p>(g) <i>Mahanth Ram v. Prem Das</i>, 10 Pat. 817.
 (h) <i>In the matter of the Petition of Hurro Lall Shaha</i>, 8 Cal. 570.
 (i) <i>Walter Smith v. Dona'd</i>, A. I. R. (1938) Sind. 262.
 (j) <i>Haimabati v. Kunja Mohan</i>, 35 C. W. N. 387; <i>Aswini Kumar v. Sukhaharan</i>, 35 C. W. N. 568; <i>Radhashyam v. Ranga Sundari</i>, 24 C. W. N. 541; <i>Sachindra v. Hironmyjee</i>, 24 C. W. N. 538; <i>Dwijendra Nath v.</i></p> | <p><i>Goloke Nath</i>, 19 C. W. N. 747; <i>Walter Rebels v. Maria Rebels</i>, 2 C. W. N. 100; <i>Ramanandi v. Kalawati</i>, 55 I. A. 18.
 (k) <i>Azimunnisa v. Ali Khan</i>, 29 Bom. L. R. 434; A. I. R. (1927) B. 387.
 (l) <i>Saroja Sundari v. Abhoy Charan</i>, 41 Cal. 819.
 (m) <i>Harris v. Spencer</i>, 35 Bom. L. R. 708.
 (n) <i>Dina Bandhu v. Sarala Sundari</i>, (1940) 1 Cal. 33 at p. 45.</p> |
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Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

Form of caveat.

[Clauses 1, 2, and 3 correspond with sec. 251 and clause 4 with sec. 252 of the Succession Act X of 1865 and secs. 70 and 71 of the Probate and Administration Act V of 1881].

Procedure.—This section lays down the procedure to be followed by persons who want to oppose the grant. Any person intending to oppose the issuing of a grant of probate or letters of administration must file a caveat. A caveat is a caution or warning entered in the Testamentary Court giving notice to the Registrar not to issue any grant or to take any step in reference to the estate of the deceased named in the writing without notice being first given to the party or to the solicitor of the party who has lodged the caveat. It is in this form: "Let nothing be done in the matter of the estate of A. B., late of _____, deceased, who died on the _____ day of _____ at _____ without notice to C. D. of _____." (See Schedule V). Caveat is usually entered after the petition is presented and before the grant is issued. But it may be lodged before the petition is presented(o). After the caveat is lodged the caveator, if he challenges the will, must file an affidavit in support of the caveat within eight days, (see Rule 600 of the Bombay High Court Rules), see also *Chotalal v. Bai Kabubai*(p). After the caveat is filed the proceedings take as nearly as may be the form of a regular suit in which the petitioner for probate or letters of administration as the case may be shall be the plaintiff and the caveator shall be the defendant, (sec sec. 295). A caveat may be filed either before or after the petition for probate or letters of administration is filed and when it is filed after the petition is filed the petition is converted into a suit in which the petitioner is plaintiff and the caveator is defendant. Under English law a caveat remains in force for six months and may be renewed. There is no time limit under this Act. The entry of the caveat does not convert the petitioner into a contentious proceeding. The petition becomes contentious after the caveat or files affidavit in support of the caveat.

Who can contest a Grant.—The person contending the will or grant of letters of administration, called the caveator, must show that he has some interest in order to entitle him to a *locus standi* in the Probate Court(q). He must show an interest in the estate of a deceased person either by inheritance or otherwise. The test for determining generally whether a person has sufficient interest to sustain a caveat is this:—Will the grant displace any right to which the caveator is otherwise entitled? If so he has an interest, if not he has none(r). Any interest, however, slight and even the possibility of interest is sufficient to entitle the party to oppose the grant. The possibility of an interest does not apply to possibility of a party filling a character which would give him an interest at the date of the testator's death, but to the possibility of his having an interest in the result of setting aside the will(s). If the person merely alleges that certain jewels which the testator has disposed of by his will were his that is not an interest in the estate of the deceased(t). Also, a person denying the title of the testator and claiming property adversely to him cannot be said to have an interest(u).

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| <p>(o) <i>Jarat Kumari v. Bissessur</i>, 39 Cal. 245 at 249.</p> <p>(p) 22 Bom. 261.</p> <p>(q) <i>Pirojshah v. Pestonji</i>, 34 Bom. 459.</p> <p>(r) <i>Swasatnaranandji v. Lumidaram</i>, 39 Bom. L. R. 490.</p> <p>(s) <i>Nobinchandra v. Niharanchandra</i>, 59 Cal. 1808; 26 C. W. N. 685.</p> | <p>(t) <i>Komalangini v. Sowbhagiammal</i>, 54 Mad. 24; 59 M. L. J. 529.</p> <p>(u) <i>Abhiram v. Gopal Dass</i>, 17 Cal. 43; <i>Mahanth Ram v. Prem Dass</i>, 10 Pat. 817; <i>Srigobind v. Mussti Laljhari</i>, 14 C. W. N. 119; <i>Pirojshah v. Pestonji</i>, 34 Bom. 459.</p> |
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If the caveator claims the property by paramount title he has no *locus standi*(v). A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property can in no sense be deemed to claim an interest in the estate of the deceased(w). If a person alleges that the property which the deceased purports to dispose of by his will is not capable of being so disposed of on the ground that it is the joint Hindu family according to the Mitakshara law cannot enter a caveat against the grant of probate or letters of administration. It is the invariable practice of the Probate Court that on an application for grant of probate or letters of administration the Court will not go into the question as to the title of the property which the testator by his will purports to dispose of(x). All these cases were considered by Engineer J., in *Atmaram v. Kedarnath*(y) in a petition for probate No. 423 of 1937 (Suit No. 4 of 1938) in the Bombay High Court where a caveat was filed on behalf of a minor who challenged the due execution of the will and who contended that the property which the testatrix purported to dispose of by her will did not belong to her but belonged to the joint family and that she had only widow's interest in it and that on her death the property passed to the caveator by survivorship. In giving judgment His Lordship said that if the property was stridhan property, of the testatrix the caveator could claim no interest in it. On the other question His Lordship also said that having regard to the decisions quoted above it was not the province of the Probate Court to decide the question of title in probate proceedings, and dismissed the caveat and ordered the *guardian-ad-litem* to pay the petitioner's costs. (Judgment delivered on 23-8-38). If interest is shown by a party contending the will, then the onus of proving that the will is genuine will be on the person propounding the will and not on the person contending that the will is a forgery(z).

The following persons are held to have no interest.—(1) A mere creditor of the deceased. His interest is only to see that the assets are sufficient to pay the debts of the deceased. He has no interest to challenge the validity of the will(a). But in *R. S. Sinha v. Miss Pabna*(b) it was observed that a creditor who has attached a portion of the estate might possibly be a person who has an interest in the estate of the deceased. Also when letters of administration are granted to a creditor he has an interest to oppose the grant of probate, (Halsbury Vol. 14 p. 221).

(2) A debtor of the deceased has no interest to oppose the grant of letters of administration(c).

(3) A person who alleges that he and the testator were joint and the property disposed of by the will is joint family property has no *locus standi* to contest the grant of probate or letters of administration(d).

The following persons have a sufficient interest to entitle them to a *locus standi*, in a Probate Court to contest the will.

(1) Mortgagees of the estate of the deceased have an interest in such estate entitling them to intervene and be heard in opposition to an application to *withdraw* probate(e).

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| (v) <i>Janki v. Ram Bahadur</i> , (1933) Ind. Rul. 18. | (z) <i>Sukh Devi v. Kedar Nath</i> , 23 All. 405 (P. C.). |
| (w) <i>Kashi Nath v. Dulhin Gulzari</i> , A. I. R. (1941) Pat. 475. | (a) <i>In re Desputty Singh</i> , 2 Cal. 208. |
| (x) <i>Ochavaram v. Dolatram</i> , 28 Bom. 694; <i>Pirojshah v. Pestonji</i> , 34 Bom. 459; <i>Abhiram v. Gopal Dass</i> , 17 Cal. 48; <i>Komalangi Ammal v. Sowabhogiammal</i> , 54 Mad. 24. | (b) 20 Pat. 75; A. I. R. (1941) Pat. 151. |
| (y) <i>Unreported</i> . | (c) <i>Santosh Kumar v. Jaladaoshi Devi</i> , A. I. R. (1941) Pat. 18. |
| | (d) <i>Ramyaad v. Ram. Bhiju</i> , 10 Pat. 812. |
| | (e) <i>Kashi Chandra v. Gopi Krishna</i> , 19 Cal. 48; see also <i>Surbomongala v. Shashibhosun</i> , 10 Cal. 413. |

(2) An assignee of the estate of the deceased, whether he acquired the interest in the estate of the deceased at the time of his death or subsequently if the will is at variance with his interest(f).

(3) A legatee under a previous will, but not necessarily a legatee under the will in question(g).

(4) A judgment creditor of the next-of-kin of the testator, when the object of obtaining probate is to defraud the judgment creditor of the property which, but for the will, would have passed to the next-of-kin(h).

(5) An attaching creditor of the son's interest under Hindu law has sufficient interest to oppose the grant of the father's will(i); see, however, *Nilmoni Singh v. Umanath Mookerjee*(j) where their Lordships of the Privy Council expressed grave doubt whether an attaching creditor can oppose the grant of probate or apply to have it revoked.

(6) A creditor of the heir or next-of-kin of the testator may be vitally interested in impeaching the will and he is held to have an interest to oppose the grant(k). But in *Nilmoni Singh v. Umanath Mukerjee*(l) it was held that the creditors of the heir or next-of-kin of a deceased person were not persons having an interest and this was approved by their Lordships of the Privy Council but when the object of obtaining probate is to defraud the creditor by passing the property to the executor which would otherwise have come to the heir it was held that he has an interest to oppose the grant(m).

(7) An assignee of the interest of the widow(n), but not a widow who has a bare claim for maintenance and whose right is not affected by the will(o).

(8) A daughter-in-law, if her right to maintenance is affected by the will(p). The widow of an undivided brother of the husband of the testatrix if her right to maintenance is affected by the will(q).

(9) A presumptive reversioner to property with which a will deals has a sufficient interest(r). If the immediate reversioner does not contest, the next reversioner can enter caveat and contest the will,(s).

(10) A purchaser from the heir of the property of the deceased has a *locus standi* to come in and allege that the will of the deceased is a forgery and should be revoked(t).

Grounds upon which the Grant may be opposed

(1) **In case of wills.**—The grant of probate may be opposed on the following grounds :—

(a) Want of due execution.

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| (f) <i>Mokshadayini Dassi v. Karnadhar</i> , 19 C. W. N. 1108. | (g) <i>Rahamtullah Sahib v. Roma Rau</i> , 17 Mad. 373; <i>Draupadi v. Rajkumari</i> , 22 C. W. N. 564. | (p) <i>Indubala v. Panchumani</i> , 19 C. W. N. 1169; see also, <i>Khetramoni v. Shyama Churn</i> , 21 Cal. 539. |
| (h) <i>In re Bhobosoonduri Dabee</i> , 6 Cal. 460; <i>Kishen Dai v. Satyendra Nath</i> , 28 Cal. 441. | (i) <i>Arahal v. Narayana</i> , 34 Mad. 405; <i>Surbomongala v. Shashibhooshun</i> , 10 Cal. 418. | (q) <i>Hanumantha v. Letchamma</i> , 49 Mad. 960. |
| (j) 10 Cal. 19 (P. C.), 10 I. A. 80. | (k) <i>In re Desputty Singh</i> , 2 Cal. 208. | (r) <i>In re Hurro Lall</i> , 8 Cal. 570; see also, <i>Shashi Bhushan v. Rajendra</i> , 40 Cal. 82; <i>Syama Charan v. Prafulla</i> , 19 C. W. N. 882. |
| (l) 10 Cal. 19. | (m) <i>Dina Bandhu v. Sarala Sundari</i> , (1940) 1 Cal. 39. | (s) <i>Satin Chandra v. Saroda Sundari</i> , 27 C. L. J. 320. |
| (n) <i>Shashi Amin v. Chandras Nath</i> , 8 C. W. N. 748. | (o) <i>Gorabhai Dassi v. Pratap Chandra</i> , 4 C. W. N. 602; <i>In the goods of Gobinda</i> , 17 C. W. N. 1141. | (t) <i>Nalinchandra v. Nibaran Chandra</i> , 59 Cal. 1809; <i>Komolochun v. Nibrutun</i> 4 Cal. 360; <i>Muddun Mohun v. Kali Churn</i> , 20 Cal. 87; <i>Digamber v. Narayan</i> , 18 Bom. L. R. 38; <i>Lalit Mohan v. Navadip</i> , 28 Cal. 587; <i>Mokshadayini v. Karnadhar</i> , 19 C. W. N. 1108. |

- (b) Wont of competent understanding.
- (c) Want of knowledge and approval.
- (d) Undue influence.
- (e) Fraud.
- (f) Instrument not intended to operate as a will, or that it has been revoked, (Halsbury, Vol. 14, pp. 177 to 180 and Halsbury Edn. Vol. 14, pp. 226-232).

The caveator may also oppose the grant of probate on the ground of discovery of another will; but in that case it is obligatory on him to propound such will by a separate petition if the caveator is either an executor or a universal or residuary legatee(*u*). If the caveator is not the executor under the later will, a citation is necessary under sec. 229 calling upon the executor to accept or renounce his executorship and if the executor renounces or fails to accept the executorship within the time limited for acceptance or refusal thereof, the will may be propounded and the letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in cases of intestacy(*v*). If the executor chooses to apply for probate the proceedings may be commenced by his filing the petition and the two proceedings may be consolidated and heard together.

(2) **In case of Intestacy.**—Grant of letters of administration may be opposed on the following grounds.

- (a) Applicant not the right person entitled to the grant.
- (b) Intestate has left no property of which grant could be made.
- (c) Intestate neither resided nor left property within the Court's jurisdiction.
- (d) Estate has been fully administered and the grant will be nugatory(*w*).

Appeal.—An appeal lies to the High Court from the order of a District Judge admitting a person as a caveator under this section(*x*). But no appeal lies against an order refusing to make a person caveator(*y*). An order refusing stay of *issue* of probate is judgment within the meaning of clause 15 of the Letters Patent(*z*).

285. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable.

After entry of caveat, no proceeding taken on petition until after notice to caveator.

[This is sec. 253 of the Succession Act X of 1865 and sec. 72 of the Probate and Administration Act V of 1881.]

After the caveat is filed the procedure laid down in this section is to be followed by the District Judge and the District Delegate. No proceedings for grant shall be taken until after notice is given to the caveator.

The procedure to be adopted by the caveator is as follows:—

In the High Courts as soon as a caveat is filed the Testamentary Registrar gives notice of the filing of the caveat to the petitioner or his solicitors. (Rule 649

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| <ul style="list-style-type: none"> (u) <i>Venidas v. Champabai</i>, 31 Bom. L. R. 1014. (v) <i>Ushrani v. Hemlata</i>, A. I. R. (1946) C. 40. (w) <i>Durga v. Atul Chandra</i>, (1938) 1 Cal. 75. (x) <i>Abheram v. Gopal Dass</i>, 17 Cal. 48. | <ul style="list-style-type: none"> (y) <i>Khetramoni Dasi v. Shyama Churn</i>, 21 Cal. 539. (z) <i>Musst. Brij Coomaree v. Ramrick Dass</i>, 5 C. W. N. 781. |
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of the Bombay High Court Rules). The caveator is required to file an affidavit in support of his caveat within eight days stating the right and interest of the caveator and his grounds of objection to the grant. (Rule 650 of the Bombay High Court Rules). In the affidavit the caveator may take up the following position. With his affidavit the caveator may give notice to the petitioner that he "merely" insists upon the will being proved in solemn form and only intends to cross-examine the witnesses produced in support of the will and he will be given liberty to do so. In this case he will not be liable to pay the costs of the other side, unless the Court otherwise orders. (Rule 651 of the Bombay High Court Rules). This rule is based on O. 21, rule 18 of the Supreme Court Rules of England. On such notice a plea of undue influence or fraud will not be allowed(a). The corresponding rule of the Calcutta High Court was construed on the word "merely" in *Santasila v. Narendra Nath*(b). Or the caveator may take up other grounds of undue influence or fraud etc. for opposing the grant in which case he runs the risk of paying the costs of the petitioner if he loses his contentions. Upon the affidavit in support of the caveat being filed the petitioner must take out a summons and the proceedings shall be numbered as a suit, petitioner being the plaintiff and the caveator being the defendant and the procedure shall be according to the provisions of the Code of Civil Procedure. (Rule 652 of the Bombay High Court Rules). If no such affidavit in support of the caveat is filed, the caveat drops, the matter never becomes contentious and the Registrar can proceed to grant probate or letters of administration(c).

286. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

District Delegate
when not to grant
probate or adminis-
tration.

Explanation.—"Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

[This is sec. 253-A of the Succession Act X of 1865 and sec. 73 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act V of 1881.]

This section restricts the powers of District Delegates. A District Delegate's power to make the grant is limited to non-contentious proceedings. As soon as a caveat is entered no proceedings shall be taken by the District Delegate and he is debarred from granting the probate or letters of administration(d). The section is silent as to what is to be done in such cases, but presumably the case will be referred to the District Judge or the District Delegate may return the papers under sec. 288 to the petitioner or he may himself send them to the District Judge.

Explanation.—The expression "contentious proceedings" mean proceedings to oppose the grant. It means opposite of common form grant(e). The mere filing of a caveat does not make the proceedings contentious; they become contentions when an affidavit in support of the caveat is filed(f). Non-contentious business is explained in Rule 600 of the Bombay High Court Rules. It includes the business of obtaining the grant where there is no contention.

(a) *Santasila v. Narendra Nath*, 56 Cal. 55.

(b) 56 Cal. at 55 p. 59.

(c) *Chotalal v. Kabubai*, 22 Bom. 261 at 265.

(d) *Pramesh v. Nilak Ram*, A. I. R. (1932)

L. 48 ; 133 I. C. 896.

(e) *Annamalai v. Malayandi*, 29 Mad. 426.

(f) *Chotalal v. Kabubai*, 22 Bom. 261.

287. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Power to transmit statement to District Judge in doubtful cases where no contention.

[This is sec. 253-B of the Succession Act X of 1865 and sec. 74 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act VI of 1881].

This section applies to non-contentious proceedings. It gives discretion to the District Delegate in cases of doubt to refer the matter to the District Judge for directions. On receipt of the papers by the District Judge, he may adopt two alternative courses, (a) he may give directions to the District Delegate to act as per his instructions or (b) stop all proceedings before the District Delegate leaving the party to make application to the District Judge.

288. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do; and, in that case, the same shall be sent by him to the District Judge.

Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in this Court.

[This is sec. 253-C of the Succession Act X of 1865 and sec. 75 of the Probate and Administration Act V of 1881 and sec. 7 of the District Delegates Act VI of 1881].

There are two cases in which this section applies, (1) in all contentious cases and (2) in all doubtful cases.

The procedure laid down is to return the papers to the petitioner so as to enable him to present the same to the District Judge or the District Delegate may impound them and he may himself send them to the District Judge.

289. When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

Grant of probate to be under seal of Court.

[This is part of sec. 254 of the Succession Act X of 1865 and sec. 76 of the Probate and Administration Act V of 1881. The other part is given in schedule VI.]

Under this section probate is granted of the original will, although the will is not annexed to the grant. The original will remains in the registry and a copy is annexed if the will is in the English language. If the will is not in the English language, then its official English translation is annexed. In such a case the grant is not of the translation but of the original will and if there is any passage in the will which is incorrectly translated, the Court will look into the original will for construction(g).

The form of *probate* is given in Schedule VI. It must bear the seal of the Court. The form of probate issued by the Bombay High Court is given in forms Nos. 106 and 107 at pp. 316-317 of the Bombay High Court Rules. It is in the form of an undertaking by the executor to administer the estate properly with a further undertaking to file an inventory of the property within six months from the date of grant and to file a true account of the administration within one year from the same date.

290. When it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

[This is part of sec. 255 of the Succession Act X of 1865 and sec. 77 of the Probate and Administration Act V of 1881. The other part is given in Schedule VII.]

The form of the grant of letters of administration is given in Schedule VII. It must bear the seal of the Court. The form of letters of administration granted by the High Court of Bombay is given in form No. 108 of the Bombay High Court Rules at p. 318. It also contains similar undertakings by the administrator to administer the estate and to file an inventory and account.

291. (1) Every person to whom any grant of letters of administration, other than a grant under section 241, is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person —

(a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate;

(b) the District Judge may demand a like bond from any person to whom probate is granted.

[Clause 1 is sec. 256 of the Succession Act X of 1865. Clause (2) is new. The corresponding sec. 78 of the Probate and Administration Act V of 1881 was as follows:—"Every person to whom any grant of letters of Administration is committed, and, if the Judge so direct, any person to whom Probate is granted shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order, directs."]

History of the Section.—In 1865 amended Letters Patent were issued to the High Court, and in the same year the Indian Legislature enacted the Indian Succession Act of 1865, section 256 of which provided for the taking of the administration bond. Under that section no bond could be demanded from an executor. That Act did not apply to Hindus, Mahomedans, etc. In 1881 the Probate and Administration Act was passed which applied to Hindus, etc., and sections 78 and 79 were similar to sections 256 and 257 (sections 291 and 292). Under that Act the exception in favour of attorneys did not exist and even in the case of an executor the Court was given a discretion to ask for an administration bond. This difference is retained in the present section and the exception laid down in clause (1) does not apply to Hindus, Mahomedans, etc., and the bond may be demanded even when probate is granted under sub-sec. (2).

Sub-sec. (1).

Under this sub-sec. in case of all persons, an administration bond is always required, in all cases of grant of letters of administration either with or without the will annexed whether the deceased was a European, Anglo-Indian, Indian Christian or a Parsi or a Hindu or Mahomedan. It is not required from an executor in cases of grant of probate(*h*). The only exception laid down in this section is when the grant is made under sec. 241, *i.e.*, when the executor is absent and letters of administration with the will annexed are granted to his attorney or agent for the use and benefit of the principal. Such an attorney or agent is not required to sign an administration bond.

Conditions of the Bond.—In the case of the grant of letters of administration generally the bond is conditional upon the doing of the following things : (1) making a true and perfect inventory of all the assets which by law devolve upon the administrator and come to his hands, (2) well and truly administering the estate, and (3) filing a just and true account of the administration of the estate, (see form of bond No. 103 of the Bombay High Court Rules). A further condition is also added in cases of limited grants of delivering up the grant of letters of administration in the event of a will being found and brought before the Court. When the grant is committed to a creditor of an intestate, a further condition is inserted that he is not to prefer his own debt and that he will pay all the debts rateably.

Form of Bond.—This section enacts the giving of an administration bond to the District Judge. The Bombay High Court Rule 630 directs the bond to be taken in favour of the Prothonotary. The Calcutta High Court requires the bond to be taken in favour of the Registrar, but in actual practice it is taken in the name of the Chief Justice. The Madras High Court requires the bond to be taken in the name of the Registrar.

The bond must be attested by a Gazetted officer of the Court when executed in Court and by a clerk nominated by the Prothonotary if executed outside the Court House, (Rule 633 of the Bombay High Court Rules).

Number and Qualification of Sureties.—In all cases when bond is executed one or more common sureties are required. The High Court of Bombay requires two sureties. Solicitors are accepted as sureties but not solicitor's clerks. A surety described as a managing clerk, manager, clerk, secretary, accountant, cashier, book-keeper, gentleman of no occupation or insurance agent is not accepted without further explanation, (Coote's Probate Practice, 15th Edn., p. 124). The sureties must execute the bond, (Rule 630 of the Bombay High Court Rules). The bond is to be given for double the amount of the property for which the grant is to be made.

Under this section the Court has no power to dispense with the bond from an administrator(*i*).

(*h*) *Dineem v. Emperor*, A. I. R. (1938) L. 151; 171 I. C. 391. (*i*) *In the goods of Gubboy*, 26 Cal. 408.

The Court may dispense with sureties altogether taking only the bond from the administrator upon sufficient ground being shown, (see Coote's Probate Practice, 16th Edn., p. 154). An application for leave to dispense with the sureties should be made by motion to the Judge, (Rule 648 of the Bombay High Court Rules).

The bond is to be taken before the grant and not after(*j*). The section is not limited to cases where the grant is first made; if the bond becomes inoperative by the death of the surety or otherwise, the District Judge has jurisdiction to take a second bond with fresh sureties if necessary(*k*).

Justifying Sureties.—Justifying sureties to the administration bond are called for at the Court's discretion according to the circumstances of each case. By Rule 631 of the Bombay High Court Rules justifying sureties are required in the following cases :—

1. When any person takes out letters of administration in default of the appearance of any person cited.

2. When any person takes out letters of administration for the use and benefit of a lunatic unless he be a committee of the estate of such lunatic appointed by Court.

3. When any person takes out letters of administration for the use and benefit of a minor.

4. When any person entitled to a portion only of the estate takes out letters of administration to the whole estate.

Sub-sec. (2).

In cases where the deceased is a Hindu, etc., or a Mahomedan the administration bond may be required. This is discretionary,

(a) even if the grant is made under sec. 241 and

(b) even from an executor if the District Judge in the exercise of his discretion thinks proper(*l*). If the testator in the will states that the executor should not be required to give any security, the judge should not distrust the executor and require him to give security(*m*).

Appeal.—An appeal lies under this section. The discretion given to the Judge to require an executor to give bond is to be exercised judicially and if it is judicially exercised the Appellate Court will not interfere(*n*).

Administrator-General.—Under sec. 29 of the Administrator-General's Act when letters of administration are granted to the Administrator-General he is not required to enter into any bond or give any security.

292. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him

(j) *Giribala v. Bijoy Krishna*, 31 Cal. 688.

(k) *Raj Narain v. Ful Kumari*, 29 Cal. 68.

(l) *Surendra v. Amrita Lal*, 47 Cal. 115.

(m) *Monmohini v. Taramoni*, A. I. R. (1929)

C. 793.

(n) *Zubeida v. Mohamed*, A. I. R. (1938) R. 67; *Sri Ram v. The Crown*, 20 Lah. 424.

or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

[This is sec. 257 of the Succession Act X of 1865 and sec. 79 of the Probate and Administration Act V of 1881.]

Where the condition of the bond is broken, the Court may order it to be assigned and the assignee named in the order is entitled to sue on the bond in his own name as if it had been originally given to him and to recover as trustee for all persons interested the full amount recoverable in respect of any breach(o). This section is discretionary and the Court is not obliged to assign. The Court may refuse to assign if the applicant is guilty of delay. Before the Court may be called upon to assign it has to see (1) that the application is *bona fide*, (2) that a *prima facie* case is made out and (3) that the applicant is a proper person(p).

The application for assignment is made by summons which should be served on the administrator against the sureties to show cause why the bond should not be assigned, (Halsbury, Vol. 14, p. 209 and Hailsham Edn., Vol. 14, p. 281). It is also made by way of a petition, (Mortimer on Probate p. 468).

What constitutes a Breach.—As to what would constitute a breach of the condition of the bond will depend upon the facts of each case. Ordinarily if the administrator applies and converts to his own use the effects of the intestate, so that they are entirely lost to the estate, that would be a breach of the condition to well and truly administer the estate. Or if he distributes the property without making provision for the payment of legacy payable at a future date, that would be a breach of the condition(q). (See Halsbury, Vol. 14, p. 209 and Hailsham Edn., Vol. 14, p. 281).

Liability of Sureties.—Once the bond is filed and so long as the grant is unrevoked the sureties are and must remain liable for the wrongful acts and defaults of the administrator even though the grant of administration in favour of the administrator has been cancelled and fresh letters are granted to the Administrator-General(r). An administration bond is not an instrument of the kind referred to in sec. 74 of the Contract Act so as to make the party liable to pay the whole amount. He is only liable to pay the amount of actual loss. If failure to file an inventory and account in time has not resulted in any damage, nothing can be recovered under the bond(s).

To whom Bond may be Assigned.—The Applicant must show that he is interested in the estate of the intestate and that he is the proper person to sue(t). The bond may be assigned to the Administrator-General(u).

Procedure for Assignment of Bond.—The applicant must take out a chamber summons. In the affidavit in support the applicant must make out a *prima facie* case and show that the application is *bona fide* and that he is the proper person to whom the bond should be assigned(v), (Coote's Probate Practice 16th Edn., p. 400).

(o) *Kalimuddin v. Meharvi*, 39 Cal. 568.

(p) *Manubhai v. General Accident Fire and Life Assurance Corporation*, 38 Bom. L. R. 632; *Adam Suleman v. The Commercial Union Assurance Co. Ltd.*, (Times of India, 12-3-38).

(q) *Dobbs v. Brain*, (1892) 2 Q. B. 207.

(r) *Debendra Nath v. Administrator-General*, 35 I. A. 109; 35 Cal. 955 P. C. (appeal) from 38 Cal. 713 (F. B.)

(s) *Cussetjee v. Dadabhai*, 19 Mad. 425; *Lachmandas v. Chater*, 10 All. 29.

(t) *In the goods of Young*, (1866) L. R. 1 P. & D. 186.

(u) *Debendra Nath v. Adm.-General*, 35 I. A. 109.

(v) *Manubai v. General Accident Fire and Life Assurance Co. Ltd.*, 60 Bom. 1027 at 1061 [in appeal (1941) Bom. 202.]

Appeal.—An order refusing to grant the assignment is appealable(w); but it was held in *Kalimuddin v. Meharui(x)*, that an order granting assignment is not appealable.

Discharge of Surety.—The Court will not discharge the original sureties to an administration bond and allow others to be substituted for them(y). The English practice is to the effect that a surety cannot by giving notice get himself discharged, (Mortimer on Probate, p. 465). A surety to an administration bond is not a common law surety and cannot discharge himself without the order of the Court. The position of a surety is not similar to that of a surety under the Contract Act so as to entitle him to be discharged by giving notice under sec. 130 of the Indian Contract Act(z). The liability continues until the fulfilment of the obligation by the administrator. The question of discharge of surety falls under three heads :—

(1) Discharge from or vacating the bond at the instance of the surety. The view taken in *Rajnarain v. Fulcoomari(a)* that the surety can discharge himself by notice under section 130 of the Indian Contract Act was not approved of in *Subraya v. Rajammal(b)* and has now been definitely disposed of by the Judicial Committee in *Mahomed Ali Mamooji v. Howeson Bros.(c)*, where it was held that a surety cannot discharge himself without the order of the Court.

(2) Discharge from the bond by order of Court on the ground of default by the administrator. In *Bai Somi v. Chokshi Ishwardas(d)*, an application was made for such an order but was refused. In *Kandhya Lal v. Manki(e)* the surety applied for cancellation of the bond during the course of administration and the Court held that it had no jurisdiction to make such an order. It was also held that a surety was not a continuing guarantee within the meaning of sec. 129 of the Contract Act. In *Radhika Nath v. Rati Kanta(f)* the question whether a surety may be discharged from future liability upon good cause being shown with the sanction of the Court was discussed but not decided. It was held in that case that mere allegation of misconduct on the part of the administrator was not enough; but in *National Guarantee Association v. Prayag Deb(g)* the Allahabad High Court held that the Court had power on good cause being shown to release the surety from all liability for future transactions and a similar ruling was given by the Lahore High Court in *Sri Ram v. The Crown(h)* where it was held that a surety was entitled to be discharged as regards future transactions on a good cause being shown such as maladministration. In *In the goods of Nani Lal Das(i)* it was, however, held that the mere maladministration by the administrator was no ground for discharging the surety. In the absence of inquiry it is not competent for the Court to declare that the administration is complete and to discharge the surety.

(3) Discharge from the bond by the Court because of the fulfilment of the obligation by some form of declaration or finding that the estate has been properly administered. In *Arthur Gerald Norton Knight(j)* the Court refused to make an order although evidence was led to show that the administration was complete. To the same effect is *Kandhya Lal v. Manki(k)* and in *re Kanailal Khan(l)*, where the Court held that neither the administrator nor the surety could be discharged. The

(w) *Adam Suleman v. The Commercial Union Assurance Co. Ltd.*, (Times of India, 12-8-38).

(x) 39 Cal. 563.

(y) *In the goods of Stark*, L. R. 1 P. & D. 76.

(z) *In the goods of Nani Lal Das*, (1939) 2 Cal. L.

(a) 29 Cal. 68.

(b) 28 Cal. 161.

(c) 30 C. W. N. 266 (P. C.).

(d) 19 Bom. 245.

(e) 31 All. 56.

(f) A. I. R. (1925) C. 158.

(g) 54 All. 292.

(h) 20 Lah. 424.

(i) (1939) 2 Cal. 1.

(j) 38 Mad. 373.

(k) 31 All. 56.

(l) 18 C. W. N. 320.

liability of the surety is immediate and permanent and can only disappear on the fulfilment of the obligation by the administrator. Default by the latter is no ground for discharging the bond. The Court is not able to declare that the administration is complete. In *Gulam Ali v. Rahimtulla(m)* it was held that the Court had no power to cancel the surety bond and release the surety from the liability from future transactions on the ground of maladministration and the Court can require fresh surety where the existing surety fails or to revoke the grant if fresh surety not granted.

The Bombay High Court has, however, adopted the practice of vacating the bond and discharging the surety on accounts being passed by the Commissioner for taking accounts.

Limitation.—The Privy Council decision in the *General Accident Fire and Life Assurance Corporation Ltd. v. Jammahomed(n)* overrules the decision in *Manubhai Chunilal v. the General Accident Fire and Life Assurance Corporation Ltd.(o)* In Manubhai's case it was held by Blackwell J., that Art. 68 of the Indian Limitation Act applies to the surety bond taken under this Act and the right to enforce the obligation under the bond for the breach of any of the conditions thereunder would become barred by limitation within 3 years under that Article. But that decision was reversed by the Appeal Court and the Appeal Court held that on the assignment being executed under sec. 292 a new starting point of time arises for the purpose of limitation by the virtue of which the assignee gets a fresh independent cause of action to recover the loss for which the obligors under the bond are liable. Their Lordships of the Privy Council have overruled this decision of the Appeal Court and have held that the suit on an administration bond is governed by Art. 68 of the Indian Limitation Act and the time begins to run from the date of a breach of the condition of the bond, that the assignment of the bond under sec. 292 does not give rise to a new cause of action, and that the suit filed by the assignee of the bond against a surety more than 3 years after the death of the administratrix is clearly barred by the law of limitation because the breach of the condition of the bond in that case must have taken place during the life-time of the administratrix. The view taken by Blackwell J. was approved. In delivering the judgment Viscount Maugham observed, "it is possible that the sympathy for the plaintiff was allowed to affect the decision of the Appeal Court". But in spite of the fact "that great hardship may occasionally be caused by the statute of limitation yet the statutory rule must be enforced according to their ordinary meaning".

Having regard to this decision the question that arises is when the obligation of the bond is deemed to have been broken within Art. 68 of the Indian Limitation Act, that is to say when should the condition be deemed to have been broken so that the period of limitation may begin to run from the date of such a breach. As the bond contains several obligations according to the judgment of Blackwell J., and the judgment of Robinson C.J.,(p) the limitation does not begin to run from the date of the first breach of the obligation of the bond, but when the last breach is committed and these decisions have been approved by their Lordships of the Privy Council in the case quoted above as laying down a correct law.

Art. 68 of the Limitation Act prescribes the period of three years from a suit when the condition is broken. If the breach is a continuous one, a fresh cause of action arises at every moment of time during which the breach continues. (see Halsbry's Vol. 20 Hailsham Ed. p. 649). If there are several obligations time begins to run from the date of the last breach as observed above. The period of limitation according to the English Statute of Limitation is 20 years from the date of the breach

(m) A. I. R. (1941) R. 259.

(n) 67 I. A. 416 ; (1941) Bom. 202.

(o) 60 Bom. 1027.

(p) *Maung Sen v. Maung Kyaw*, 1 Rang. 468.

of the condition, (see p. 430 of the Report 67 I.A.). The English Statute has kept the period a fairly long one so that the claims of all parties under disability may not be jeopardised, but according to the decision of the Privy Council the period of limitation in India is only 3 years under Art. 68.

293. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

Time for grant of probate and administration.

[This is sec. 258 of the Succession Act X of 1865 and sec. 80 of the Probate and Administration Act V of 1881.]

This section is based on the English practice, (see Halsbury, Vol. 14, p. 169 and Hailsham Edn., Vol. 14, p. 210). Probate includes letters of administration with the will annexed. An application for grant of probate may be made before seven days, but the actual grant can only be made after the expiry of the period of seven days(g). Therefore letters of administration with the will annexed may be granted after the expiration of seven days from the death of the testator(r).

The period is to be calculated excluding the day of the death of the testator. It is only that grant cannot be made but an application for probate or letters can be made immediately after the death of the deceased.

294. (1) Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for wills is established.

Filing of original wills of which probate or administration with will annexed granted.

(2) The Provincial Government shall make regulations for the preservation and inspection of the wills so filed.

[This is sec. 259 of the Succession Act X of 1865 and sec. 81 of the Probate and Administration Act V of 1881.]

When the will is proved, the original must be deposited in Court registry and a copy thereof is made out under the seal of the Court and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate. Under rule 646 of the Bombay High Court Rules only the grant, the act or undertaking and the will are copied in the Court Register.

295. In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Procedure in contentious cases.

[This is sec. 261 of the Succession Act X of 1865 and sec. 83 of the Probate and Administration Act V of 1881.]

(g) *Chandra Kishore v. Prasanna*, 38 Cal. 327. (r) *In the goods of Wilson*, 1 Cal. 149.

Proceedings for the grant of probate or letters of administration may take the form of a suit; but they do not in all cases become a regular suit within the provisions of the Code of Civil Procedure(s). The provisions of the Code only apply after the proceedings become contentious. When the proceedings become contentious it is not open to the Court to decide the matter in a summary way(t).

The proceedings become contentious not on filing of the caveat but on the filing of an affidavit in support of the caveat(u). The petitioner becomes the plaintiff and the caveator is the defendant(v). In such proceedings the only issues for trial are (a) whether the testator was of sound and disposing mind when he made the will and (b) whether the will was duly executed and attested. A caveator cannot be permitted to set up another will filed by him to be proved by way of counter claim. His remedy is to file a separate petition(w). If at the hearing the caveator does not appear, the Court should not merely dismiss the caveat but should order the issue of grant if the petition is otherwise in order.

Res Judicata.—In *Kalyanchand v. Sitabai* (supra) it was held that the finding of the Probate Court that the testator was not of sound and disposing mind would operate as *res judicata* between the parties to the proceedings. Such a judgment is not a judgment *in rem* with the meaning of sec. 41 of the Evidence Act. In *Pakiam v. Innasi*(x), on a petition for probate a caveat was entered and the petitioner withdrew his petition; subsequently the caveator applied for letters of administration and the petitioner entered caveat to oppose the grant; it was held he was entitled to propound the will in opposition to the application for letters of administration. In *Arunamoyi v. Mohendranath*(y) the Probate Court construed the will to ascertain whether the petitioner was the residuary legatee under the will and entitled to the grant of letters of administration with the will annexed. The opponent was the widow of the testator. The Probate Court found that he was the residuary legatee. The widow subsequently filed a suit against the administrator for the construction of the will. It was contended in defence that this section applied and the suit was barred by *res judicata*. It was also contended that under sec. 41 of the Evidence Act, the decision of the Probate Court was a judgment *in rem*. It was held that the application for letters of administration with the will annexed was not a suit properly so called that the construction of the will by Court was only incidental to determining the question of the applicant's title to the grant and could not be regarded as *res judicata* either under sec. 13 of the Code of Civil Procedure or under the general principles of *res judicata*.

- 296. (1)** When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

Surrender of revoked probate or letters of administration.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

(s) *Ko Maung v. Daw Tok*, 6 Rang. 474.

(t) *Noor Mohammad v. Mohammad Kareem*, A. I. R. (1938) M. 502.

(u) *Chotalal v. Bai Kabubai*, 22 Bom. 261; *Pakiam v. Innasi*, 19 Mad. 458; *Haji Bibi v. H. H. Sir Sultan*, 10 Bom. L. R. 327.

(v) *Kalyanchand v. Sitabai*, 38 Bom. 309; 16 Bom. L. R. 5 (F. B.).

(w) *Venidas v. Champabai*, 53 Bom. 829; 31 Bom. L. R. 1014; A. I. R. (1930) B. 29.

(x) 19 Mad. 458.

(y) 20 Cal. 888.

[This is sec. 333 of the Succession Act X of 1865 and sec. 157 of the Probate and Administration Act V of 1881.]

On the revocation of the grant, the person to whom it is made must deliver it back to the Court which granted it so that the Court may cancel it from the Register and if he wilfully disobeys the order he is liable to punishment. If a grant which has been revoked cannot be found an affidavit is required showing the reason why it cannot be found. This is to protect persons dealing with the estate, because by allowing it to remain, an unscrupulous grantee may take unfair advantage. In *Barnes v. Durham*(z), a revoked grant was allowed to remain with the solicitors of the administrator who claimed a lien.

297. When a grant of probate or letters of administration is revoked, all payments *bona fide* made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

[This is sec. 262 of the Succession Act X of 1865 and sec. 84 of the Probate and Administration Act V of 1881.]

Effect of Revocation.—All payments *bona fide* made to an executor or administrator under a grant which is subsequently revoked constitute a legal discharge to the person making the payment and the executor or administrator may retain and reimburse himself in respect of any payment made by him which the person to whom probate or letters of administration is afterwards granted might have lawfully made. If a decree is passed against the executor, its validity is not affected by the subsequent revocation of probate(a).

According to English Law there is a distinction between grants which are *void* and grants which are *voidable*, and the test adopted there to distinguish the one from the other is this:—Where the grant is in derogation of the right of an executor it is void, but where the grant is in derogation of the right of the next-of-kin or residuary legatee, it is voidable. If the grant is void, the mesne or intermediate acts of the executor or administrator done between the grant and its revocation shall be of no validity. If the grant is voidable, the mesne acts of the executor or administrator will stand good(b). The decisions in *Abram v. Cunningham* and *Ellis v. Ellis*, were overruled in *Hewson v. Shelley* (c), and the better view seems to be to regard all grants as voidable and to protect *bona fide* transferee for value without notice(d). (see Mortimer on Probate, p. 436). Statutory effect is now given in England by sec. 37 of the Administration of Estates Act, 1925, and all grants are declared to be voidable and not void. The same view prevails in India(e). There is no such distinction under this Act. in *Gopal Dass v. Budree Dass*(f), it was held that a grant of letters of administration obtained by suppressing a will containing no appointment of executor was not void *ab initio* and a sale of property by an administrator to a purchaser who was ignorant of the suppression of the will was valid,

(z) 1 P. & M. 729.

(a) *Mathew v. Nepran*, 9 Rang. 300; A. I. R. (1931) R. 283.

(b) *Urban v. Cunningham*, 2 Lev. 182; *Allen v. Dundas*, 2 T. R. 125; *Ellis v. Ellis*,

(1905) 1 Ch. 613.

(c) (1914) 2 Ch. D. 13.

(d) *Fitzpatrick v. M'Glone*, (1897) 1 Ir. 342.

(e) *Sailaja v. Indu Nath*, 19 C. W. N. 240.

(f) 33 Cal. 657.

although letters of administration were revoked after the sale. In *Pundit Prayag Raj v. Gou Karan(g)*, it was held that acts done under a will which is declared to be a forgery are void. But there has been a divergence of opinion, and the better view seems to be to protect the rights of *bona fide* transferees for value without notice of any fraud or circumstance affecting the grant. In *Debendra Nath v. Administrator-General of Bengal(h)*, it was held that the grant was not void *ab initio*. Although the grant was obtained fraudulently by a rogue and an impostor; so long as the grant remained unrevoked, the administrator represented the estate and his receipts were valid discharges. The surety who had signed the administration bond was held liable to make good the amount misappropriated by the administrator. A *bona fide* purchaser of property sold under the grant of probate or letters of administration which are subsequently revoked acquires a good title(i). A mortgage by an executor or administrator does not become invalid on the subsequent revocation of the grant of probate(j).

298. Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

Power to refuse
letters of adminis-
tration

[This is sec. 55 of the Probate and Administration Act V of 1881.]

This section only empowers the Court to refuse the grant of letters of administration in cases of Hindu (not coming under sec. 57) and Muhammadans and is discretionary. The Court has no power under this section to refuse the grant of probate(k). The reasons for refusal are to be stated, the Court may refuse the grant when it is convinced that it is not for the benefit of the estate.

299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

Appeals from
orders of District
Judge.

[This is sec. 263 of the Succession Act X of 1965 and sec. 86 of the Probate and Administration Act V of 1881.]

This section is very wide in its scope and applies to all the orders made by a District Judge by virtue of the powers conferred on him by this Act(l). The word "hereby" in this section means by the whole Act and not by the orders made under this chapter; therefore an appeal lies from an order granting permission to the executor or administrator for the sale of the property under sec. 307(m). An appeal lies under this section from an order:—admitting a person as caveator(n); from an order dismissing an application for probate(o); from an order granting

(g) 6 C. W. N. 787.

(h) 35 Cal. 955 (P. C.); 35 I. A. 109.

(i) *Saitaja v. Jadu Nath*, 19 C. W. N. 240.

(j) *A. B. Neogi v. B. B. Neogi*, A. I. R. (1933) R. 43.

(k) *Hara Coomur v. Dorgamoni*, 21 Cal. 195; *Pran Nath v. Judo Nath*, 20 All. 189.

(l) *Fakirji v. Meherban*, 14 Bom. L. R.

603; *U. Po Hnit v. Mavung Bo*, A. I. R. (1929) R. 109.

(m) *Uma Churan v. Muktakeshi*, 28 Cal. 149.

(n) *Abhiram v. Gopal Dass*, 17 Cal. 48; see *contra*, *Khettramoni v. Shyama Churn*, 21 Cal. 539.

(o) *Shaikh Azim v. Chandra Nath*, 8 C. W. N. 748.

or refusing probate(*p*). An appeal lies from an order directing an executor to furnish fresh security(*q*). An appeal lies from an order granting probate on condition that security should be furnished(*r*). But the Appeal Court will not interfere with an order for security under sec. 291(*s*). In the undermentioned cases no appeal was allowed(*t*). An appeal lies under the Letters Patent from the decision of a single Judge of the High Court on appeal from the order of the District Judge granting probate(*u*). An appeal lies from an order rejecting the application of a person to oppose the grant on the ground that he has no *locus standi*(*v*).

The meaning of this section is that in every case in which an appeal will lie under the Code of Civil Procedure, an Appeal will lie from an order made by the District Judge under this Act. If an interlocutory order is not appealable under the Code, similarly an interlocutory order will not be appealable, under this section(*w*).

300. (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

Concurrent jurisdiction of High Court.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay, shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the Provincial Government has, by a notification in the Official Gazette, authorised it so to do.

[Clause (1) is sec. 264 of the Succession Act X of 1865 and sec. 87 of the Probate and Administration Act V of 1881; Clause (2) is sec. 2 of the Probate and Administration Act V of 1881. The words "and the Province of Burma" have been omitted as per Government of India (adaptation of Indian Laws) order 1937.]

Sub-Sec. (1)

Under this sub-sec. the High Court has concurrent jurisdiction with the District Judge, and it has power to grant probate and letters of administration in any case in which the grant can be made by the District Judge. In *Nagendrabala v. Kashipati*(*x*), it was held that the High Court had jurisdiction to make a grant on the original side in any case in which the District Court had jurisdiction and that it was not necessary that any portion of the property should be within the limits of the original jurisdiction. The "High Court" mentioned in this section is not merely confined to the appellate jurisdiction but includes original jurisdiction(*y*). It means High Court as a whole and the litigant has to approach the particular department of the Court which deals with the matter in dispute. Where the dispute relates to a matter of an original nature, e.g. removal of executor the application must be made on the original testamentary side(*z*).

(*p*) *Miss Eva Mountstephens v. Mr. Hunter Garnett*, 35 All. 448.

(*q*) *Sri Ram v. Emperor*, 20 Lah. 424.

(*r*) *L. T. Dineen v. Emperor*, A.I.R. (1938) L. 151

(*s*) *Zubaida v. Muhammad*, A. I. R. (1938) R. 67.

(*t*) *Lucas v. Lucas*, 20 Cal. 245; *Brojo Nath v. Dasmony*, 2 C. H. C. R. 589; *Sheikh Kalamuddin v. Meharvi*, 39 Cal. 563; *Laksh Narain v. Multan Chand*, 16 C. W. N. 1099.

(*u*) *Unrao Chand v. Bindrabai*, 17. All. 475.

(*v*) *Nalinchandra v. Nibaram*, 59 Cal. 1808.

(*w*) *Khetramoni v. Shyama Charan*, 21 Cal. 339; *Prasad Narain v. Dulhin Genda*, 18 C. L. J. 612; *Monomohini v. Taramoni*, A. I. R. (1929) C. 733.

(*x*) 37 Cal. 224.

(*y*) *In the goods of Mohendra*, 5 C. W. N. 377.

(*z*) *Fateh Chand v. Allimuddin*, A. I. R. (1940) C. 264; *Jnan Kumar v. Ram Kumar*, (1940) 1 Cal. 79.

Sub-Sec. (2)

This sub-sec. owes its origin to the Probate and Administration Act, sec. 2. Except in the case to which the Hindu Wills Act, 1870, applied (present sec. 57) the concurrent jurisdiction of the High Courts is omitted. Under the Hindu Wills Act the Courts had no jurisdiction to grant probate or letters of administration except in the cases of persons governed by the said Act. This defect was remedied by the Probate and Administration Act and the District Courts were empowered to grant probate and letters of administration by sec. 51. As the Hindu Wills Act conferred jurisdiction on the High Courts in the Presidency towns also to make grant of probate, by sec. 2 of the Probate and Administration Act, the concurrent jurisdiction of the High Court was only confined to the cases falling under the Hindu Wills Act.

This sub-sec. re-enacts the same provision except with slight modification. The words "Except in cases to which section 57 applies" are substituted for the words "Except in cases to which the Hindu Wills Act, 1870, applies" as the Hindu Wills Act is repealed by this Act.

301. The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

Removal of executor or administrator and provision for successor.

[This is sec. 264-A of the Succession Act X of 1865 and sec. 87-A of the Probate and Administration Act V of 1881 and sec. 4 of the Administrators-General and Official Trustees Act V of 1902.]

Removal and Discharge of Executor or Administrator.—This section reproduces section 4 of the Administrator-General's Act V of 1902 which itself reproduces the Judicial Trustees Act of England (59 and 60 Vict. c. 35) sec. 23 of the Administrator-General's Act III of 1913 is to the same effect. Sec. 264-A was added to the Indian Succession Act, 1865, by the Amending Act XVIII of 1919, and by the same Act section 87A was added to the Probate and Administration Act. Until the said Acts were passed the Courts had no power to remove an executor, as distinguished from a trustee, though a limited power existed in the Courts of imposing restraint on his powers by appointing a receiver(a). After the above Acts were passed if the removal of an executor is sought, the only remedy is by way of petition under this section. The use of the word "may" in this section shows that a proper case must be made out. It is not open to the Court to dismiss the petition without inquiry. When such a petition is presented the Court should inquire into the allegations made in the petition and if necessary to take evidence(b). Previously an executor could not be discharged even by the Court from his executorship. But when the funeral and testamentary expenses have been paid, debts and legacies satisfied, and the surplus invested upon the trust of the will, the executor drops his character as an executor and becomes a trustee and may then be discharged like any other trustee(c), (Lewin on Trusts, 11th Edn., p. 816). Similarly an administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position towards the next-of-kin. He ceases to be an administrator and becomes a trustee and the Court can appoint a new trustee either in his place or jointly with him(d).

- (a) *Hafizabai v. Kazi Abdul Karim*, 19 Bom. 83. (c) *Ex-parte Amerchand Madhewji*, 29 Bom. 188.
 (b) *Dhanabakkiammal v. Thangavelu*, 50 Mad. 956. (d) *In re Ponder, Ponder v. Ponder*, (1921) 2 Ch. 59.

It must also be remembered that very often the position of an executor is considered as that of a trustee; but their functions are quite distinct. An executor may be regarded as occupying the position of a trustee for the purpose of administering the estate; and he may also be a trustee under a will appointing him executor and creating the trust; but that is quite a different matter from saying that an executor *qua executor* is a trustee. The true position powers and duties of an executor are essentially different from those of a trustee(e). When the executor drops his character as an executor and becomes a trustee after the payment of the funeral and testamentary expenses and the debts liabilities and legacies and after he has invested the residue of the estate upon the trusts of the will, he may then be discharged like any other trustee. (See Lewin on Trusts 14th Edn., p. 431).

He can then be removed or discharged by—

(1) The appointment of new trustee under the express power.—The express power to appoint a new trustee in the place of trustees who remain abroad or become unfit or incapable of acting would include such power.

(2) Under the statutory power contained in sec. 73 of the Indian Trusts Act II of 1882 to appoint a new trustee in place of a trustee who remains out of British India for more than 12 months or refuses or is unfit to act or is incapable of acting.

(3) By the Court under the power contained in sec. 35 of the Trustees Act XXVII of 1866 to appoint a new trustee when it is found inexpedient, difficult or impracticable to do so without the assistance of the Court. In exercising jurisdiction under this Act there must be no dispute of facts and it must expedient to do so(f). If the executor trustee is unwilling to retire, the Court will appoint Public Trustee(g). But when there is dispute as to facts, the Court will refuse to exercise jurisdiction(h).

(4) Under the inherent jurisdiction of the High Court. In exercising its jurisdiction of removing a trustee the Court has laid down the broad principle that its main guide must be the welfare of the beneficiaries. It is not the mistake or neglect of duty or the inaccuracy of conduct of the trustees which will induce the Court to adopt such a course. The acts of omission must be such as to endanger the trust property or to show the want of honesty or want of proper capacity to exercise duties or the want of reasonable fidelity between the trustees and the beneficiary. A friction between trustee and trustee is not of itself sufficient for the removal of trustees, but where such friction or hostility will obstruct or hinder due performance of the trustee's duties the Court may come to a conclusion that it is necessary for the welfare of the beneficiary that the trustee should be removed(i). (Lewin on Trusts, 14th Edn., pp. 431-432.)

By this section the power to remove an executor or administrator and to provide for a successor to his office is conferred on the High Court alone. Such relief cannot be sought by a regular suit(j). An executor so discharged remains liable for anything he has done or left undone while an executor. The discharge only relieves him from the duties of his office from the date of discharge. He may be discharged on his own application(k).

Under sec. 25 of the Administrator-General's Act No. III of 1913 any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which any of the assets of the estate in respect of

(e) *Hara Coomur v. Doorgamoni Dasi*, 21 Cal. 193 at p. 199.

(f) *Re Henderson, Henderson v. Henderson*, (1940) W. N. 240.

(g) *Re May's Will Trusts, May v. Bull*, (1940) W. N. 32.

(h) *Re Combes*, 51 L. T. 45.

(i) *Letterstedt v. Broers*, 9 App. C. 371 at p. 389.

(j) *Shrimati Karam Devi v. Radha Kishan*, 16 Lah. 275.

(k) *Ex-parte Amerchand Madhooji*, 29 Bom. 188.

which such executor or administrator has obtained probate or letters of administration are situate transfer the assets vested in him to the Administrator-General by an instrument in writing notified in the official-Gazette(l). When such transfer is made all powers of disposition of the estate which the executors possessed pass to the Administrator-General(m).

Procedure.—An application for the removal of an executor under this section is to be made by petition to the Judge sitting on the original side exercising testamentary and intestate jurisdiction(n). The question whether a suit can lie for the removal of an executor was considered in *Dhanabalkhiyammal v. Thangavelu*(o) and it was held that the only remedy for the removal of an executor is under this section. To the same effect is the decision in *Shimati Karam Devi v. Radha Kishan*(p) where it was held that removal cannot be sought by a regular suit.

Appointment of Receiver.—As a general rule the Court will not appoint a receiver against an executor because his appointment as executor shows that the testator had confidence in him and the Court will give full weight to that expression of confidence and will require a very strong case to be made out for a receiver against an executor. Gross misconduct, serious mismanagement, misuse or misapplication of the estate in his hands would be grounds justifying the appointment of receiver(q). Bankruptcy or insolvency of a sole executor is also a ground for such appointment. (see Williams on Executors, 12th Edn., pp. 1282-1284).

But this rule of the Court of Chancery that a receiver will not be appointed against an executor unless gross misconduct was shown is not applicable to the case of an executor of the will of a Mahomedan(r).

302. Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

Directions to
executor or admin-
istrator.

[This is sec. 264-B of the Succession Act X of 1865 and sec. 87-B of the Probate and Administration Act V of 1881.]

This section was enacted in 1919 as sec. 264-B of the Act of 1865 and corresponds to sec. 34 of the Indian Trusts Act and sec. 43 of the Trustees and Mortgagees Powers Act XXVIII of 1866. It is an enactment taken from English practice adopted under statute 22 and 23 Vict. c. 35. Sec. 264-B was added to the Indian Succession Act X of 1865 by XVIII of 1919. The section is general in its terms as regards the application. Under this section an executor or administrator shall be at liberty without the institution of a suit to apply by petition to any judge of the High Court for the opinion, advice or direction as to the management of the estate. The directions to be given under this section relate strictly to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises and taking proceedings. The jurisdiction of the Court under this section is merely advisory and is confined to directions

(l) *Adm.-General v. Premlal*, 22 Cal. 788 (P. C.)

(m) *In the goods of Nundo Lall*, 23 Cal. 908.

(n) *Jnan Kumar v. Ram Kumar*, (1940) 1 Cal. 79.

(o) 50 Mad. 956.

(p) 16 Lah. 975.

(q) *Adm.-General v. Prem Lall*, 21 Cal. 737.

reversed in appeal to Privy Council, 22 Cal. 788 (P. C.); *Adm.-General v. Prem Lall*, 22 Cal. 1011; *Middleton v. Dodswell*, 13 Ves. 268; *Pandurang v. Dwarkadas*, 35 Bom. L. R. 161.

(r) *Hafizabai v. Kazi Abdul Karim*, 19 Bom. 83.

relating to the management and administration of the estate. No directions can be given under this section in disputed matters of law or fact and it is doubtful if the Court is competent to determine disputed questions of title under this section(s). In *Secretary of State v. Parijat*(t) an application was made under this section by the mother of a deceased legatee for payment to her of the share of her son legatee by the Administrator General. The Administrator-General filed an affidavit in reply in which he stated amongst others that he found difficulty as regards the making over the share of the deceased legatee which share came to over twenty-five lacs in government securities to the applicant as no representation was taken to the estate of the deceased legatee and therefore the applicant could not give a valid discharge. Moreover the applicant had only a limited interest *viz.* Hindu mother's interest. It was held by their Lordships of the Privy Council that the share of the deceased legatee was not a debt and sec. 214 was not applicable. As regards sec. 302 their Lordships held that there was no dispute as to the facts and the only substantial question was whether the Administrator-General should pay to the applicant her deceased son's share of the residue without the production of a succession certificate. The application under this section was in regard to the estate or in regard to the administration thereof "and the Court had jurisdiction to entertain the application and directed the Administrator-General to hand over the share to the applicant on the applicant producing the succession certificate. Under this section the High Court alone has the power to give directions. The District Court has no jurisdiction to entertain a petition under this sec.(u) The High Court alone can act under this sec. and has powers similar to the Court of Chancery in England to give directions conferred under O. 55, r. 3 of the Supreme Court Rules(v). The application for directions may be made by the executor or administrator or by a party interested in the estate. In *Secretary of State v. Parijat*(w), the heirs of the residuary legatee were held entitled to apply for directions under this section.

Procedure.—Directions can be obtained by petition or by an Originating Summons on the original side of the High Court in its testamentary jurisdiction.

CHAPTER V.

Of Executors of their own Wrong.

303. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

(s) *In re Lakshmibai*, 12 Bom. 638; *In re Lorez's Settlement*, (1861) 1 Dr. & Sm. 401; *Pratinidhi v. Om. Prakash*, A. I. R. (1984) L. 120; *Vanama v. Vanama*, 51 Mad. 849; *Prokash Chandra v. Ashutosh*, 56 Cal. 979; *Sudhansu Mohan Sirkar v.*

Harish Chandra, 20 Pat. L. T. 871. A. I. R. (1985) P. C. 208.

(t) *Winsor v. Winsor*, 44 Bom. 682; *In re Madras Dovelon Trust Fund*, 18 Mad. 443. (u) *Akkayya v. Lakshamma*, 51 Mad. 650. (w) 63 I. A. 61; 63 Cal. 677.

Illustrations.

(i) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong.

(ii) A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(iii) A sues as executor of the deceased, not being such. He is an executor of his own wrong.

[This is *ser. 265 of the Succession Act of X 1865*].

This section applies to Hindus, etc., and to Mahomedans.

Sections 265-266 of the Succession Act X of 1865 were not incorporated either in the Hindu Wills Act or in the Probate and Administration Act. Under the present Act, sections 303 and 304 are made applicable to Hindus, and to Mahomedans also. In the Bill that was introduced in Council, section 302 ran as follows:—“Nothing in this Chapter shall apply when the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina or an exempted person,” but it was omitted in the Select Committee, ‘see Statement of Objects and Reasons’. Even before this Act the principles laid down in sections 303 and 304 were applied to Hindus and Mahomedans on the principles of equity and good conscience(x). Before, however, holding a Hindu or a Mahomedan liable as an executor *de son tort* it must be remembered that Hindus and Mahomedans are not required to obtain probate or letters of administration. Where, therefore, the *heirs* of a deceased Hindu or Mahomedan take possession of the property and administer the same and pay the debts of the deceased, they will not incur the liability to account as executors *de leur tort* but will only be liable as the heirs of the deceased(y). Proceedings against an executor *de son tort* must be commenced by writ and not by originating summons(z).

Definition of Executor de son tort.—An executor *de son tort* is one who takes upon himself the office of an executor or intermeddles with the estate of the deceased without having been appointed an executor and without having obtained a grant from a competent Court. He is not necessarily a wrong doer and his possession cannot always be regarded as wrongful at its inception. The mere taking away of a portion of the property of the deceased when there is a legal representative present does not make that person an executor *de son tort*(b). But a very slight circumstance of intermeddling will make him an executor *de son tort*(c). The term is equally applicable in the case of an intestacy as there is no such term as an administrator *de son tort*(d), (Halsbury, Vol. 14, p. 147 and Halsam Edn., Vol. 14, p. 177). In order to constitute a person executor *de son tort* there must be no rightful executor or administrator. Therefore, a person who is named in the will as executor if he acts before taking out probate is not an executor *de son tort*(e).

The mere fact that the person did not profess to act as executor will not relieve him from liability; but if a person claims a title not derived from the testator but a paramount title he does not make himself liable as an executor *de son tort*(f).

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| (v) <i>Prayag v. Siva Prasad</i> , 42 C. L. J. 280; A. I. R. (1926) C. 1 at 51 <i>Rajah Parthaswarathy v. Rajah Venkatadri</i> , 46 Mad. 190; <i>Sudhasook v. Ram Chunder</i> , 17 Cal. 620; <i>Khittish Chandra v. Radhika</i> , 35 Cal. 276; <i>Ramasami v. Veerappa</i> , 33 Mad. 423. | (a) <i>Shivaprasad v. Praya Kumari</i> , 61 Cal. 711. |
| (iy) <i>Haji Saboo Sidick v. Ally Mahomed</i> , 6 Bom. L. R. 1135. | (b) <i>Satiya Ranjan v. Sarat Chandra</i> , A. I. R. (1926) C. 825. |
| (z) <i>In re Leask</i> , 65 L. T. Rep. 199; <i>In re Chalmers</i> , (1921) W. N. 129; <i>Jackman v. Sutcliffe</i> , L. T. (1942) 64. | (c) <i>Prayag Kumari v. Siva Prasad</i> , A. I. R. (1926) C. 1, at p. 50; <i>Navazhai v. Pestonjee</i> , 21 Bom. 400. |
| | (d) <i>Khittish Chandra v. Radhika</i> , 35 Cal. 276; <i>Magaluri v. Narayana</i> , 3 Mad. 359. |
| | (e) <i>Balakbala v. Jadunath</i> , 57 Cal. 1358. |
| | (f) <i>Prayag Kumari v. Siva Prasad</i> , A. I. R. (1926) C. 1 at p. 52. |

What Acts do not make a person executor *de son tort*.

First Exception :—All acts of kindness and charity do not make the person liable as executor *de son tort*. This Exception is taken from Williams on Executors 12th Edn., pp. 158-159 which runs as follows :—“There are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship ; such as the locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left and defraying the expenses of the funeral himself or out of the deceased’s effects, making inventory of his property, feeding the cattle, repairing his houses, or providing necessities for his children ; for these are offices merely of kindness and charity”.

Second Exception :—Stokes in his commentary to section 265 (present section 308) observes as follows :—“As to the second Exception it is clear that if A takes the goods of the deceased and sells or gives them to B, this shall charge A as executor of his own wrong, but (in the absence of collusion) not B. Thus where a lessee died intestate during the term and his widow entered without taking possession and paid rent and afterwards her son-in-law took the premises with her concurrence and the landlord’s assent and paid rent, and continued to occupy during the remainder of the term it was held that he had not made himself executor of his own wrong.” According to illustration (ii) if the deceased had appointed an agent to act for him, the agent cannot be charged as executor of his own wrong if he continues to act after the death of his principal so long as he is not aware of the death of his principal. But if he continues to act after he has become aware of the death of his principal, he is an executor of his own wrong in respect of the acts done by him thereafter.

304. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

[This is sec. 266 of the Succession Act X of 1865.]

This section applies to Hindus, etc.

Liability of Executor “*de son tort*.”—A person can only be executor *de son tort* as long as he intermeddles with the estate. His liability lasts as long as he continues dealing with the estate(g). In *Narayanasami v. Essa Abbayi*(h) the rule of English law that no liability as executor *de son tort* can arise when there is another personal representative was not applied to India. He is held liable to account for assets which come to his hands, not upon the basis of entrustment, but upon the basis that not being entrusted, he had no business to intermeddle. The liability does not depend upon the bad faith of the person intermeddling(i).

He is answerable :—

- (1) To the rightful executor or administrator. or
- (2) To any creditor of the deceased(j), or .
- (3) To any legatee under the will. He can be sued by a legatee in the absence of legal representative(k).

(g) *Damodar v. Dayal*, 11 Bom. L. R. 1187.

(h) 28 Mad. 351. (Distinguished in *Seshiah v. Ramesiah*, A. I. R. (1939) M. 662.

(i) *Empetor v. Susenbihari*, 58 Cal. 1051.

(j) *Ratanbai v. Narayandas*, 51 Bom. 771.

(k) *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190.

Extent of his liability. He is liable to the extent of the assets which may have come to his hands after deducting—

- (a) payments made to rightful executor or administrator, and
- (b) payments made in due course of administration.

But an agent of the executor of his own wrong who has by collecting the assets made himself also liable as executor of his own wrong cannot discharge himself by showing that he has duly accounted for his receipts to his principal, for the rule that the receipt of the agent is the receipt of the principal does not apply to the case of a wrong doer(l). According to this section the liability of an executor of his own wrong is limited to the assets received him; but if he mixes up the assets received by him with his own so as to make it impossible to distinguish the one from the other the Court will treat the whole as available to make the restitution(m).

According to the English law an executor *de son tort* has all the liabilities, though none of the privileges that belong to the character of executor(n). He may, however, protect himself against rightful representative against all payments made by him in due course of administration. In an action by a creditor of the deceased, h. may plead that the estate is fully administered. (Halsbury, Vol. 14, p. 180).

Effect of Acts of an Executor *de son tort* upon the Property of the Deceased.—"All lawful acts which an executor *de son tort* doth are good," (o). "A legal act done by an executor *de son tort* shall bind the rightful executor and shall alter the property"(p). Though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor may do and accordingly if he pleads properly he cannot be made liable beyond the extent of the goods which he had administered and therefore under a plea of *plene administravit* he shall not be charged beyond the assets come to his hands and in support of the plea he may give in evidence payments made by himself of debts of the deceased of equal or superior degrees and even after action brought he may dispose of the assets in discharging a debt of a higher degree." (Ingpen on Executors 2nd Edn., p. 268). But if an executor *de son tort* retains assets for his own use or pays his own debt he cannot plead *plene administravit*(q). In order that the alienation or payment made by an executor *de son tort* may be binding on the rightful executor or administrator, it must be shown (and the onus will be on the alienee or the purchaser) that the executor *de son tort* really acted as executor and the party with whom he dealt had fair reason for supposing that he had authority to act as such. If this is proved, the alienation will be binding on the executor and shall alter the property(r). (Williams on Executors, 12th Edn., pp. 166-167.)

CHAPTER VI

Of the Powers of an Executor or Administrator

305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

In respect of causes of action surviving deceased and rents due at death.

[This is sec. 267 of the Succession Act X of 1865 and sec. 88 of the Probate and Administration Act V of 1881. The words "and to distrain for all rents due to him at the time of his death" have been omitted and the words "and, may exercise the same power for the recovery of debts" substituted.]

(l) *Shorland v. Mildon*, 5 Hare 469.

(m) *Manghuri v. Narayan*, 3 Mad. 359.

(n) *Carmichael v. Carmichael*, 2 Phill. C. C. 103.

(o) *Coulter's Case*, 5 Co. 30b.

(p) *Parkar v. Kett*, 1 Ld. Raym. 661.

(q) *Narayansami v. Esa Abbayi*, 28 Mad. 351.

(r) *Thomson v. Harding*, 2 E. & B. 630.

Survival of Right of Action.—By virtue of sec. 211 all the property of the deceased vests in the executor or administrator as such. This section lays down that the executor or an administrator alone can sue in respect of any cause of action which survives the deceased and section 306 makes clear what those causes of action are. Hence an executor or an administrator completely represents the estate and all the rights and liabilities of the deceased are in him and him alone. All the rights which the deceased could have exercised in his lifetime and all the liabilities to which the deceased was subject vest in the executor or administrator. These rights do not survive in favour of the heirs(s). The causes of action which survive are either in contract or in tort and the liability of the executors or administrators is not personal but to the extent of the assets of the deceased which come to their hands, (sec. 306).

Actions in Contracts.—Sec. 37 of the Indian Contract Act provides as follows:—"Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract." Therefore, on the death of a person all obligations, contracts, debts and other engagements survive to and against his executors or administrators. The right to sue for damages for breach of contract, the right to sue on a promissory note, the right to sue for debt, the right to sue on a mortgage, the right to sue for pre-emption recognised by Mahomedan Law(t), all survive. Only such contracts which are merely personal to the deceased, e.g., an action for divorce (see ill ii sec. 306) or breach of promises to marry (Halsbury Vol. 14, p. 80) or which involve personal skill, ability or character do not survive(u), e.g., an agreement between a master and servant, an agreement to write a book or to paint a picture. In the case of breach of promise of marriage an action cannot be maintained by or against the legal representatives of the promisor. If a person applies for probate and dies pending the grant, the right does not survive(v).

Legal representatives are also entitled to have their names entered in the company's register without any statement that they hold the shares in a representative capacity and to have them inserted in such order as they please(w).

Order 31 rule 1 of the Code of Civil Procedure lay down the procedure in all suits concerning the property vested in an executor or an administrator. Where the contention is between the beneficiaries interested in such property and a third person, the executor or the administrator shall represent the beneficiaries, and it is not necessary to make the beneficiaries parties to the suit.

Actions in Torts.—(See commentary to sec. 306.)

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Illustrations.

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative.

(s) *Sayyad Jiaul v. Sitaram*, 36 Bom. 144.

(t) *Sayyad Jiaul v. Sitaram*, 36 Bom. 144.

(u) *Tomey v. Rama*, 17 Cal. 115; *Mohendra*

v. Kali Prosad, 30 Cal. 265.

(v) *Sarat Chandra v. Nani Mohan*, 36 Cal. 709.

(w) *Re Saunders & Co. Ltd.*, (1908) 1 Ch. 413.

[This is sec. 268 of the Succession Act X of 1865 and sec. 89 of the Probate and Administration Act V of 1881].

This section lays down that all the rights to prosecute or defend any action or special proceedings survive to and against his executors or administrators. This section gives the right to an executor or administrator and not to an heir of the deceased. The words "executors or administrators" mean persons who are appointed by the Court to administer the estate of the deceased person. The dictum in *Peoples Bank v. Desraj*(x) that the section was wide enough to include heirs as representing the estate is not correct and was not approved in *Official Liquidator v. Jugul Kishore*(y). In *Bireswar Ghose v. Srish Chunder*(y¹) it is observed that to extend sec. 306 to all causes of action including those affecting property would be to stultify to a great extent sec. 212 (2). Which exempts a Hindu Mahomedan or an Indian Christian from applying for letters of administration in case of intestacy. Further that such a conclusion of sec. 306 would raise a direct conflict with O. 22 R. 3 (1) of the Code of Civil Procedure. In cases, therefore where the parties are exempt under sec. 212 (2) from applying for letters of administration not only are the heirs of a deceased plaintiff or defendant who died intestate the proper persons to be substituted but the law requires that all ascertainable heirs should be so substituted in the deceased's place.

The term "special proceedings" covers summary proceedings under section 235 of the Indian Companies Act. That section is in the same terms as sec. 276 of the English Companies Act. Under the English Act it was held that there was no right to institute or continue summary proceedings for misfeasance against the personal representatives of a deceased director and the corresponding section under the Indian Act was construed in the same manner, and it was held that the right to bring summary proceedings under sec. 235 against a director does not survive(z).

Actions in Torts.—The general rule is that the legal representatives cannot sue or be sued for a wrong committed by or against the deceased for which unliquidated damages only would be recoverable; the rule is expressed in the maxim *actio personalis moritur cum persona*. This maxim, however, does not form part of the law of India and is very largely abrogated by the present section. Claims by and against the legal representatives of a deceased person are regulated by this section and by Acts XII and XIII of 1855(a). Hence an action against trustees for the loss caused by breach of their obligation survives(b). A claim to recover property or its value survives under this section(c). A cause of action for fraud survives. An action for pecuniary loss caused through deception and the consequent liability for the same survives after the death of the person liable for such loss(d).

Under this section no action can be maintained by or against the legal representatives of a deceased person, in respect of the following actions :—

(1) Action for defamation.

(2) Action for assault or other personal injuries not causing death. The words "personal injuries" mean bodily or physical injuries as opposed to injury to property or reputation and are *ejusdem generis* with the word "assault" and not with "defamation." Therefore a cause of action in respect of injury to the credit and reputation of the plaintiff caused by the wrongful acts of the deceased defendant does not fall within the exception but survives against the executor or administrator(e). The word "personal" means all personal injuries in the commonly

(x) A. I. R. (1935) L. 706.

(y) A. I. R. (1939) A. 1.

(y¹) A. I. R. (1946) C. 299.

(z) *Official Liquidator v. Jugul Kishore*, A. I. R. (1939) A. 1.

(a) *Bhupendra v. Chandramoni*, 53 Cal. 987.

(b) *Peoples Bank of Northern India, Ltd. v.*

Haigopal, A. I. R. (1936) L. 271 : 160 I. C. 759.

(c) *Adjai Coal Company v. Pannalal*, 57 Cal. 1341 (P. C.).

(d) *Dehra Dun Mussoori Co., v. Hansraj*, 38 All. 342; A. I. R. (1935) A. 995.

(e) *Cassim & Sons v. Sara Bibi*, 13 Rang. 385.

accepted use of the word "personal" and is not restricted merely to physical injuries. Accordingly an action for personal injury not causing the death of the party does not survive(f). But in *People's Bank of Northern India v. Des Raj*(g) Jai Lal J. said that he was unable to agree with the view taken in that case.

(3) Actions where relief sought could not be enjoyed or granting it would be nugatory, (see illustration, ii).

An option to purchase given by will to a person was held to be *prima facie* personal and if the person died without exercising the option the right cannot be exercised by the executor or administrator of such person unless the will directs that the option is to be exercised by any one other than the legatee(h). In *In re Sykes*, this decision was followed by the Lower Court but the decision was reversed in Appeal and it was held that an option given by will to a legatee to take certain shares belonging to the testator at their par value was not necessarily personal. It was held that the question whether such option is exercisable only by the donee personally or is transmissible to his executors is one of the construction of the will. This view of the law was confirmed by the House of Lords(h¹).

(5) A suit to recover the custody of a child by a Mahomedan does not survive if the defendant dies. The suit cannot be continued against the heir of the defendant(i).

Personal Injuries and Action for Malicious Prosecution.—There has been a divergence of opinion on this subject. "Personal injury" is intended to mean injury to a person's reputation, mind or body as distinguished from injury to property. It includes all injuries which do not cause damage to the estate of the person wronged(j). The Calcutta High Court has held that malicious prosecution is a personal injury and is not covered by the exception and therefore the right to sue survives(k). But this case has been dissented from by the Bombay High Court in *Haridas v. Ramdas*(l) and *Motilal v. Harnarayan*(m), in which it has been held, that such an action does not survive. The Madras and Patna High Courts also hold the same view as the Bombay High Court(n). The Allahabad High Court has held that if such a suit is dismissed but the deceased had preferred an appeal and if he dies pending the appeal, the appeal abates(o). The Madras High Court also holds that if the appellant dies pending the appeal, the appeal abates(p). But where the suit is decided in the plaintiff's lifetime and a decree passed in his favour granting compensation the decree can be executed by his heirs executors or administrators(q).

English Law. In England the law on this subject has been consolidated by the Law Reforms (Miscellaneous Provisions) Act, 1934. (24 and 25 Geo. 5, c. 41) as follows :—

(1) Subject to the provisions of the section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate; Provided that this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under sec. 189 of the Supreme

(f) *Ratan Chand v. Municipal Committee Hingon Ghat*, A. I. R. (1931) N. 9.

(g) A. I. R. (1935) L. 705.

(h) *In re Cousins*, (1885) 30 Ch. D. 203, followed in *In re Sykes*, (1940) W. N. 154; (reversed) *In re Sykes*, (1941) 1 Ch. 1; *Skelton v. Young House*, (1942) A. C. 571.

(i) *Sharifa v. Mune Khan*, 25 Bom. 574; 3 Bom. L. R. 167.

(j) *Rustomji v. Nurse*, 44 Mad. 357.

(k) *Ratan Chand v. The Corporation of Calcutta*,

31 Cal. 993 (reversing 31 Cal. 460).

(l) 13 Bom. 677.

(m) 47 Bom. 716.

(n) *Rustomji v. Nurse*, 44 Mad. 357 (F. B.); *Palaniappa v. Rajah of Ramnad*, 49 Mad. 208; *Punjab Singh v. Ram Autar*, 4 P. L. J. 676; 52 I. C. 348.

(o) *Mahtab Singh v. Hub Lal*, 48 All. 630.

(p) *Murugappa v. Ponnusami*, 44 Mad. 828.

(q) *Salig Ram v. Charan Dass*, 21 Lah. 447.

Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery.

Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person the damages recoverable for the benefit of the estate of that person:—

- (a) shall not include exemplary damages,
- (b) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry,
- (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses, may be included.

No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—

- (a) proceedings against him in respect of that cause of action were pending at the date of his death ; or
- (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

The rights conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the

Fatal Accidents Act, 1846 to 1908 or the Carriage by Air Act, 1932 (22 & 23 Geo. 5, c. 36).

In India there are the following Acts.

(1) Act XII of 1855. **Legal Representatives Act.**—The “maxim” *actio personalis moritur cum persona* is with certain limitations as old as the English law, and the maxim has been applied to actions essentially based on tort. The rule of common law is that you cannot sue the executors for a wrong committed by the testator for which you can recover unliquidated and other damages. In such cases, whatever the form of action, it is in substance brought to recover property or its proceeds or value in actions arising out of a wrong act done by a wrong-doer. There was no remedy when a tort resulted in the death of a person, until the remedy was provided by Fatal Accidents Act of 1846 commonly known as Lord Campbell’s Act. The principles of that act were embodied in India in the Fatal Accidents Act XIII of 1855. With regard to other wrongs done in the life-time of the deceased. The first legislative enactment was the Legal Representatives Suit Act XII of 1855. Preamble to that Act states that it is expedient to enable the executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs, which according to the present law do not survive to or against such executors, administrators or representatives. The applicability of the maxim to India is thus recognised. Sec. 1 of that Act enacts that an action may be maintained by the executors, administrators or legal representatives of a deceased person for any wrong committed in the life-time of such person, which has occasioned pecuniary loss to his estate for which wrong an action might have been maintained by such person, provided that the wrong was committed within one year from his death. The damages so recovered were to be part of the estate of the deceased. The right of action was given against executors, administrators heirs or representatives of a deceased person for any wrong committed by him in his life-time for which he would have been subject to

action if such wrong was committed within one year before his death. Section 2 provides that no action commenced under the provisions of the Act shall abate by reason of the death of either party, but may be continued by or against the executors, administrators or representatives of the party deceased, provision being made for plea of want of assets. This Act therefore gives to the executors or administrators of a deceased person a right to sue for any wrong committed in the life-time of such person which has occasioned *pecuniary loss to his estate* and for which wrong an action might have been maintained by such person, provided such wrong was committed within one year before his death and such action was brought within one year after his death. Under this Act an action can also be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his life-time for which he would have been subject to an action if such wrong shall have been committed within one year before such person's death and the damages recovered against an executor or administrator be payable as simple contract debts of such deceased person.

The remedy given by this Act is confined to suits brought consequent to the death of the person and did not enable suits brought by him to be continued after his death(r). In *Rustomji v. Nurse(s)* it was contended under section 2 that in the event of the defendant dying after the filing of the suit, the suit can be continued against the legal representatives of the deceased person. But that argument did not find favour with the Full Bench and it was held that Act XII of 1855 could only apply to suits filed by the legal representatives and not to suits filed by the deceased and sought to be continued by the executors. If the legislature intended that the suits already filed were to be continued by the executors, administrators and legal representatives apt words would have been used in the Act. Although the Legislature went further than the English Act of 1833 when Act XII of 1855 was enacted and gave a fresh right of suit, it confined demands and rights to prosecute or defend suits or special proceedings by executors or administrator. In *Govindoss v. Official Assignee(t)* the question of the abatement of the suit is further discussed. Having regard to the wording of the said Act, if the suit is filed by a testator in his life-time to recover damages for injury sustained and pending the suit the testator dies, his executors cannot continue the action and similarly if the suit is filed against a person doing injury to the plaintiff and the defendant dies pending the suit the suit cannot be continued against the executors or legal representatives.

(2) Act XIII of 1855. **Fatal Accidents Act** :—Whenever death of a person is caused by wrongful act neglect or default and the act neglect or default is such as would have entitled the party injured to maintain an action if death had not ensued and recover damages, the party who would have been liable if death had not ensued shall be liable to pay damages, notwithstanding the death of the person injured. Such action can only be brought for the benefit of the wife, husband, parent and child (if any) of the person whose death was caused and shall be brought by and in the name of the executor, administrator or representative of the deceased person. The plaint must give full particulars of the person or persons for whom or on whose behalf such action is brought and the nature of the claim. The word "child" includes son, daughter, grandson, grand-daughter, stepson and stepdaughter. An adopted son of a deceased Hindu is a representative entitled to maintain the suit under this Act, although he is not a child within the meaning of this Act and is not entitled to any portion of the damages(u). In *Johnson v. The Madras Railway Company(v)*, the plaintiffs were minor children of the deceased

(r) *Haridas v. Ramdas*, 13 Bom. 677; *Ranchhode Doss v. Rukmany Bhoj*, 28 Mad. 487.

(s) 44 Mad. 357 (F. B.).

(t) 57 Mad. 931 at p. 952.

(u) *Vinayak v. G. I. P. R. Co.*, 7 B. H. C. R. 113.

(v) 28 Mad. 479.

who was killed in an accident and they sued with their mother as next friend. It was contended that in case of Europeans and Eurasians, the only "representative" of a deceased was his executor or administrator. It was held that the word "representative" was not equivalent to 'heirs' as used in Act XII of 1855 but the word included all or any one of the persons for whose benefit a suit could be maintained under the Act and that they were the representatives of the deceased. The right of the beneficiary is a distinct right in each. The word "representative" is also construed in *Esther v. Maurice*(w). It does not mean "legal representative." In the absence of an executor or administrator it includes persons for whose benefit a right of action is given by the Act. This case was followed in *Goolbai v. Pestonji*(x). It is not necessary that there should be both wife and children. In *Lyell v. Ganga*(y) the wife alone sued; there were no children and she was held entitled to damages. Unlike as in Act XII of 1855 under the Fatal Accidents Act a suit filed against a person survives against the legal representatives if the defendant dies pending the suit and it does not abate(z).

Measure of damages.—Damages must be assessed as at the date of the accident; but if prior to the decree certain circumstances arise, e.g. death of one of the parties claiming, the Court should admit evidence as to the subsequent events and deal with the realities of the event(a). In *Vinayek v. G. I. P. R. Co.*(b) the deceased was a Diwan earning Rs. 250 per month. He was 38 years old when he met with the accident and died. He left a widow aged 36 and four daughters three of whom had married before his death. Rs. 10,000 were awarded out of which Rs. 7,000 were allotted to the widow and Rs. 3,000 to the unmarried daughter. In *Ratanbai v. G. I. P. R.*(c) the deceased was 53 at the time of his death. He was a building contractor. He left a widow and three sons. At the time of his death he was insolvent and his liabilities were Rs. 1,22,359. Before his insolvency he was earning Rs. 226 per month but was living extravagantly. Rs. 6,500 were allowed as damages out of which Rs. 2,500 were allotted to the widow, Rs. 700 to each major son, Rs. 1,100 to the minor son, and Rs. 1,500 to the grandson. There was an appeal by the widow but the appeal was dismissed(d). In *Lyell v. Ganga*(e) the longevity of a native of India at 70 was considered very high and a monthly allowance of Rs. 15 secured by investment of Rs. 3,000 was awarded to the widow. In *Narayan v. The Municipal Commissioner*(f) the parents of a child five or six years old sued the Bombay Municipality for negligence and damages and it was held, as regards damages in a case of this nature, that distinct evidence of the loss sustained or benefit expected was not necessary. The position of the parents and the age of the child are to be considered. Rs. 250 were awarded by the Small Causes Court. In *Lakhmichand v. Ratanbai*(g), which was a landlord and tenant case, the tenant was killed by the fall of the privy block. Rs. 6,500 were awarded as damages and costs as between solicitor and client. In *Nani Bala v. Auckland Jute Co. Ltd.*(h), Page J. in awarding damages observed that the Court must take into account the chances of life, the chances of any improved conditions in which the family of the deceased might have passed their days, and the standard of living of the family which was dependent on the deceased. He awarded Rs. 16,000 and attorney and client costs of the suit. It was a motor car accident case. *Esther v. Maurice*(i) was also a motor car accident case. The widow of the deceased filed the suit claiming Rs. 45,000 as damages. It was stated in the plaint that the deceased died leaving a widow, the plaintiff, and others who were not

(w) 61 Cal. 480.

(x) 37 Bom. L. R. 410.

(y) 1 All. 60.

(z) *Balasubramanian v. Marian Rodrigues*, 57 Mad. 951.(a) *Williamson v. John Thorycraft & Co. Ltd.*, (1940) W. N. 308.

(b) 7 B. H. C. R. 113.

(c) 7 B. H. C. R. 113 at p. 120.

(d) *Ratanbai v. G. I. P. R. Co.*, 8 B. H. R. 130.

(e) 1 All. 60.

(f) 16 Bom. 254.

(g) 51 Bom. 274.

(h) 52 Cal. 102.

(i) 61 Cal. 480.

desirous of joining in the suit. The defendant contended that the plaintiff did not disclose any cause of action. The plaintiff was allowed to be amended and four children of the deceased were brought on the record as plaintiffs. The suit was, however, dismissed as no negligence of the motor driver was proved. *Goolbai v. Pestonji(j)* was also a motor accident case. The widow and children of the deceased sued the defendant as the owner of the motor car and claimed Rs. 15,000 as damages. Defendant denied that he was the owner of the car at the time of the accident; he was only the mortgagee of the car. The suit was dismissed, although the motor license stood in the name of the defendant. *Kuppammal v. M. & S. M. Ry., Co., Ltd.,(k)* is the case of an accident by the fall of wall of the latrine and Rs. 1,750 were awarded as damages. In this case one co-defendant was ordered to pay the costs of the other defendant. *De Mello v. Meridian Electrical Co.(l)* was the case of death by electric shock and the father of the boy killed claimed Rs. 21,600 as damages. The claim, however, was negatived as the deceased was a trespasser and the defendant company owed no duty to him. In *Secretary of State v. Rukhmini(m)*, it was held that in assessing damages the Court cannot take into consideration the mental suffering of the survivors.

English cases under the English Fatal Accidents Act of 1934:—*Morgan v. Shoulding(n)*, (reported in the Bombay Law Reporter Journal of 15th March 1938 at p. 33), was a motor car accident case the deceased being a motor mechanic 23 years old. He was killed instantaneously in a collision between his motor-cycle and the defendant's motor car. On behalf of the defendant it was contended that where a person was killed instantaneously, that person never acquired a right of action, and there was nothing that survived to the plaintiff administrator. It was, however, held that the cause of action was not the death, but the negligence of the defendant in colliding with the motor-cycle. That happened before the death, although it may be a fraction of a second, and the cause of action survived. The plaintiff was awarded £1,000 damages which has become the standardized amount in the case of a person about the age of 23. In *Mills v. Stanway Coaches Ltd.,(o)* for loss of expectation of life £100 were awarded and for pain and suffering £50. The latest case decided by the House of Lords is *Bonham v. Gambling(p)*. In that case a child was killed by a motor car and the damages of £1,200 awarded by the Lower Court were reduced to £200. In delivering the judgment Viscount Simon L. C. observed that the appeal raised the problem of the assessment of damages for "loss of expectation of life." Since the child became unconscious from the moment of the accident till death, there could be no claim for pain and suffering and the only question apart from funeral expenses was that of damages arising from the diminution of the child's expectation of life. "In such a case the question resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law, but in view of the earlier authorities we must do our best to contribute to its solution". The learned Judge observed that the earlier decisions quoted to him assumed that human life is, on the whole, good. "I would rather say that, before damages are awarded in respect of a shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award.....Of course, no regard must be had

(j) 37 Bom. L. R. 410.

(k) (1938) Mad. 283.

(l) 29 Bom. L. R. 402.

(m) (1938) Nag. 54.

(n) (1938) 1 All. E. R. 28.

(o) (1940) 2 K. B. 834.

(p) (1941) A. C. 157.

to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of life, not of loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possessions are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."

Limitation.—Under Art. 21 of the Limitation Act the suit must be brought within one year from the date of death unless the bar is saved by sec. 7 or 8 of that Act. If the suit is not filed within one year it is barred(g).

307. (1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

Power of executor or administrator to dispose of property.

Illustrations.

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina, or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely :—

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

- (ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted—
- (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or
 - (b) lease any such property for a term exceeding five years.
- (iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and (iii) of sub-section (2) or of sub-section (1) and clauses (ii) and (iii) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

[Clause (1) is sec. 269 of the Succession Act X of 1865; Clause (2) is sec. 90 of the Probate and Administration Act V of 1881.]

Sub-Sec. (1).

Alienation.

This sub-sec. gives to the executor power to dispose of the property of the testator as extensive as that of an executor in England before 1926. A transfer of the property by an executor is valid without any reference to Court and without any reference to the provisions of the will; even if the property is specifically bequeathed. [see ill. (i)]. The transfer is valid unless it be established that the transfer was without consideration or that the transferee had notice that the executor was acting in breach of trust(r). Even a mortgage by the executor is valid and the mortgagee is not bound to inquire whether there is any necessity for the mortgage or otherwise and is not concerned to see to the application of the mortgage amount, [see ill. (ii)]. The powers of an administrator under this sub-sec. are as wide as those of executor.

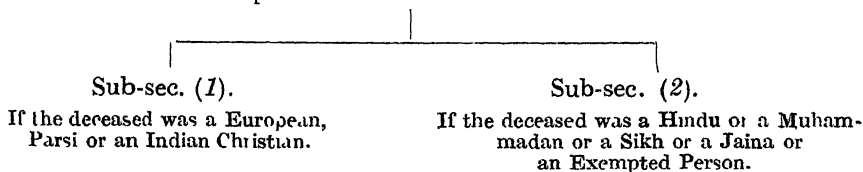
Sub-Sec. (2).

Under sub-sec. (2) the executor's powers to transfer the property are restricted by the terms of the will. The administrator's powers to transfer are also restricted.

(r) *Geetaranee De v. Narendrakrishna De*, 60 Cal. 394 at p. 402.

Analysing the two sub-sections the powers of disposal are as under :—

Power of disposal of an Executor or Administrator.



An executor or administrator has absolute power of disposal of the property of the deceased both moveable and immoveable, either wholly or in part. He can sell, mortgage, or lease the property for any number of years.

The alienee gets a good title(s). There is no distinction whether the property is moveable or immoveable(t).

An executor or administrator has power to dispose of the property of the deceased vested in him with the following restrictions :

(1) The executor's power to dispose of *immoveable* property vested in him is subject to any restriction that may be imposed on him by the will of the deceased, unless the Court which granted probate to him permits him to dispose of any immoveable property by an order in writing notwithstanding the restriction. If there is no such restriction in the will, he can alienate the immoveable property so long as he has not obtained probate(u).

(2) An *administrator* has no power to mortgage, charge, sell, make a gift of, exchange, or otherwise alienate any *immoveable* property vested in him without the previous permission of the Court.

(3) An *administrator* has no power to lease any immoveable property for a term exceeding *five years* without the previous permission of the Court.

Note.—A disposal of property by an executor or administrator in contravention of these provisions is *voidable* at the instance of any person interested in the property. The person interested means interested independently of the executor. If the person is a creditor of the executor in his personal capacity and not a creditor of the estate he is not a person interested in the property(v).

Sale.—Sub-sec. (1) applies to Europeans, Parsis and Indian Christians. As regards Indian Christians, sec. 211 applies to them ; the executor or administrator is the legal representative of the deceased and all the properties vest in him. As regards the powers of an executor of the will of an Indian Christian they are the same as those of an executor of a European or a Parsi. But as regards the powers of an administrator as sec. 212, clause (1) is not applied to Indian Christians and as in the case of an Indian Christian dying intestate letters of administration are not

(s) *De Silva v. De Silva*, 27 Bom. 103.
(t) *Seale v. Brown*, 1 All. 710.

(u) *Shemil v. Ahmed*, 32 Bom. L. R. 1056.
(v) *Jagobandhu v. Dwarika*, 23 Cal. 446.

compulsory, the rights of an administrator only come when the grant is made. Until then the heirs of an intestate Indian Christian can deal with the property and their transactions in respect of their shares are not rendered invalid by the subsequent grant of letters of administration(w).

Under sub-sec (1) the executor's and administrator's powers to sell the property are absolute and the purchaser gets a good title, notwithstanding that the property disposed of is specifically bequeathed or is limited in trust by the will(x). It is also not necessary for the purchaser to inquire whether the sale is for the purposes of administration or otherwise, provided the sale is not fraudulent or collusive(y). The purchaser has the right to infer that the legal representative is acting fairly in the execution of his duty. He is not bound to inquire as to whether the debts or legacies charged on the estate have been paid or as to the application of the money(y¹). He acquires a free complete and valid title, unless it is proved that he had express or constructive notice that the executor was committing a breach of trust(z). The onus of proving that the purchaser was a *mala fide* purchaser and had knowledge that the sale was not in due course of administration lies on the party attacking the sale(a).

Mortgage.—Under this sub-sec. (1) the executor's powers to mortgage the property of the deceased are absolute and not fettered by any restrictions in the will. A power "to dispose" would include a disposition by sale, or mortgage. But the mortgage must be for the purpose of administration only. An executor or administrator has no absolute power to dispose of the property if it is not necessary for the purpose of administration(b). He has authority to execute a legal mortgage with power of sale(c). He can create an equitable mortgage by deposit of title deeds(d). In the case of mortgage by an executor there are two aspects of the case to be examined (1) mortgage by executor disclosed as executor and (2) mortgage by executor not so disclosed.

With regard to mortgages by executors when they disclose their status as executors the rules as laid down by the Calcutta High Court(e) are as under.

- (a) An executor *qua* executor may make a mortgage for the purposes of administration. He may not do so for any other purpose, e.g. for his private purposes or for carrying on business left by the testator. Administrative purposes do not only mean payments of debts and legacies but in cases of intestacy they include the payment to one of the next-of-kin the value of his share in the estate, (Williams on Executors, 12th Edn., p. 561). When mortgaging the estate the legal representative is presumed to be mortgaging for administrative purposes and the mortgagee is not bound to see to the application of the money.
- (b) If the mortgagee has notice that the executor is not mortgaging for the purpose of administration, that is, if he has notice that the executor is borrowing for his own private purposes he becomes a transferee with notice of breach of trust and gets no better title and the mortgage will be impeached on the ground that the legal representative is not acting in the execution of his duty but is committing a breach of trust(f)

(w) *Antony v. Makis*, 34 Mad. 395.

(x) *M'Leod v. Drummond*, 17 Ves. 154.

(y) *Debendra v. Adm.-General*, 35 Cal. 955.

(y¹) *Greender v. Mackintosh*, 4 Cal. 897; *Ahronee v. Ahmed*, 38 Bom. L. R. 1056.

(z) *Sooleman v. Rahimtulla*, 6 Bom. L. R. 800.

(a) *Ganapathi v. Sivamalai*, 36 Mad. 575.

(b) *Parakeswar v. Ambica*, 55 Cal. 891.

(c) *Seale v. Brown*, 1 All. 710 (F. B.); *Ma Sein v. Chetty*, 3 Rang. 443.

(d) *Jethabai v. Chotalal*, 34 Bom. 209.

(e) *Shishikumar v. Dhirendrachandra* cited in *Geetaranee v. Narendrakrishna*, 60 Cal. 394 Ind. Rul. (1933) C. 510-511.

(f) *Geetaranee v. Narendrakrishna*, 60 Cal. 394 at p. 398.

or if the mortgagee knows that there are no administrative purposes for which the money is required(g). The onus will lie on the person impeaching the transaction to prove that the mortgagee had notice of the true state of facts(h).

In the case of a mortgage by executor not disclosed as such when the executor is also a residuary legatee the case is different. A mortgage by an executor who is also a residuary legatee to secure his private debt may be set aside at the suit of a pecuniary legatee. In the case of *Bank of Bombay v. Suleman Somjee*(i) the mortgagors were executors as well as residuary legatees. When the defendants had deposited the title deeds with the bank as security the bank was unaware that the mortgagors were executors but dealt with them as if they were entitled to the property. It was contended on behalf of the bank that, although the bank was unaware that the mortgagors were executors but as they were also residuary legatees the principle of *Graham v. Drummond*(j) applied and the transaction could not be impeached but that contention was negatived and it was held that the bank had constructive notice of the will and of its provisions, and of the charge on the property for Rs. 30,000 in favour of the widow contained in the will and the Bank took no better title than what their debtors really had viz. as residuary legatees. But if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may in the absence of notice to the contrary assume that the debts have been paid or that there are other assets for payment of debts, if any, and, therefore, the purchaser or mortgagee would be safe as against creditors. (Spence's Equitable Jurisdiction, Vol. II, p. 376, and Halsbury, Vol. 14, p. 396).

But the document by executors must show that the executors are conveying in their representative capacity and also as the legatee. If it is not so shown on the face of the document then only the beneficial interest of the persons conveying will be transferred(k).

Mortgage by Administrator:—Under sub-sec (I) an administrator has absolute power to mortgage the property of the intestate. But to justify and validate a mortgage by an administrator it must be proved that the mortgage was executed in due course of administration and that the administrator was entitled to mortgage the general estate(l).

Executor's Power to Borrow.—When an executor borrows money in his capacity as executor (the will not authorizing him to do so expressly) without creating a charge on the property and the estate under his management is enriched or benefitted by the money so borrowed the right that the creditor may claim as against the estate is a right to be indemnified out of the estate. If the right of the executor to the indemnity is not established, the creditor has no right against the estate but must look to the executor personally. A claim for money lent to the executor to discharge the debt of the testator can only be enforced against the executor personally; the decree obtained by the creditor against the executor can not be executed by attachment of the assets of the testator in the hands of the executor(m). In order to claim a right of subrogation, the lender has to prove that the loan was necessary and that it was properly applied. In this respect his position differs from that of a mortgagee who has to prove nothing of the sort. In

(g) *Ricketts v. Lewes*, (1882) 20 Ch. D. 745.

(h) *Corser v. Cartwright*, (1875) L. R. 7 H. L. 781.

(i) 7 Bom. L. R. 407 (*Goolam Hooseine v. Bank of Bombay* affirmed by Privy Council *Bank of Bombay v. Suleman Somji* 33 Bom. 1; 35 I. A. 189; 10 Bom. L. R. 1065 (see also *Jagobandhu v. Dwarika*, 23

Cal. 446 where the executor was also the residuary legatee).

(j) (1896) 1 Ch. 968.

(k) *Pura Sundari v. Bijraj*, 37 Cal. 362.

(l) *Kuberdas v. Jerkish Naoroji*, 43 Bom. L. R. 981; A. I. R. (1942) B. 54.

(m) *Byramji v. Heerabai*, 11 Bom. L. R. 250.

Annalu v. Namagini(n), an executor borrowed moneys for paying certain legacies and executed a promissory note without adding any description of himself as executor, and it was held that the creditor could not proceed against the estate and that his only remedy was to be subrogated to the rights of the executor against the estate. Executors are personally liable on promissory notes executed by them even though they may be acting for the benefit of the testator's estate. If an executor not so authorized by the will takes a loan and pledges his credit only he cannot bind the estate for its repayment. The case law on this point is discussed in *Srishchandra v. Sudhikrishna*(o), see also *Shailendramath v. Hade Kaza*(p). In order to exclude personal liability, they must comply with section 29 of the Negotiable Instruments Act. Sec. 29 of the Negotiable Instruments Act states that a legal representative may avoid personal liability on a promissory note if he adds to his signature such words as "A. B. executor of X without recourse" or "without recourse to me personally" or "A. B. executor of C.D. with recourse against the estate of C.D. only". In *Hirjibhoy v. Ratambai*(q), a promissory note was headed, "Estate of the late....." and was signed by the defendants as "executors of the estate of....." and they were held personally liable to pay the amount.

As regards the executor's power to borrow in cases of wills of Hindus, etc., see commentary under clause 2, sub-section 1, below.

Executor's Power to pledge.—The executor or administrator may even pledge the property of the deceased and the pledgee may sell the things pledged if they are not redeemed in time(r). But if the pledge is made not for the purpose of administration but long after the administration is over, the pledge will be invalid(s).

Executor's Power to Lease.—Under this clause executors and administrators have power to grant leases of the property of their testator or intestate for any number of years and may make good title. But it must be remembered that an executor's duty is to realize the assets and to administer the property in the best way possible. In this respect his position is similar to that of a trustee. The validity of the lease will therefore depend whether it was reasonably necessary for the due administration to do so. Having regard to sec. 36 of the Indian Trusts Acts the executor has no power to grant a lease for 99 years with an option to purchase the reversion(t). They may also grant an underlease but that is an exceptional method of dealing with the estate, and those who accept a title in that way take it subject to the question whether it was the best way of administering the estate, (Halsbury, Vol. 14, p. 397.)

Under sub-sec. (2) the power to grant lease is limited to five years only, [see below commentary to sub-sec. (2)].

Powers of Administrators under Limited Grants.—An administrator under a limited grant can also confer an indefeasible right in the property to a person who purchases it for value(u). An administrator *de bonis non* has the same powers(v), (see sec. 313). An administrator *durante minore etate* has the same powers as an ordinary administrator, (see sec. 314).

Sub-sec. (2).

This sub-sec. applies to Hindus, Buddhists, Sikhs, Jainas and to Mahomedans and exempted persons. Under this sub-sec. two questions arise for consideration.

(n) 33 M. L. J. 631.

(o) 59 Cal. 216 at p. 230.

(p) 59 Cal. 586.

(q) 35 Bom. L. R. 969.

(r) *Russell v. Plaice*, 18 Beav. 21; *Cassibai v. Ramchordas*, 4 Bom. 5.

(s) *Attenborough v. Solomon*, (1913) A. C. 76.

(t) *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. D. 236; *Mahomed v. Aishabai*, 34 Bom. L. R. 1365 at p. 1369.

(u) *DeSilva v. De Silva*, 27 Bom. 103.

(v) *In the goods of Mary Hemming*, 23 Cal. 579.

(1) Was any restriction imposed by the will on the statutory power to alienate the property by the executor and (2) had the transferee constructive notice of any defect in the proposed exercise of the power so as to put them in bad faith. If these two inquiries are satisfied then it is not the duty of the mortgagee to inquire into facts outside the will as they existed immediately prior to the testator's death(w).

Clause (i).

Executor's power of Sale.—Under this clause a Hindu executor is entitled to deal with the property of his testator in the same manner as the testator himself would have dealt with it unless his powers are restricted or limited by the terms of the will. Such restriction may be either express or implied. If the powers are restricted then he can not dispose of immoveable property, unless he obtains permission of the Court and the Court may give such permission in a proper and fit case, notwithstanding the restriction(x) where there is no restriction the executor can dispose of the immoveable property, even without a grant(y). If the immoveable property is subject to restriction as to alienation, then the executor of the will of a Hindu, Muhammadan, Buddhist, Sikh or Jaina has no power to sell such property without an express order of the Court. If there is no restriction in the will the executor of the will of a Hindu, etc., or of a Mahomedan is entitled to deal with the property in the same manner as the owner himself would have dealt with it and his power of sale would be as wide as under sub-sec.(I), and no order of the Court is necessary(z). He has power to dispose of the property for all purposes binding upon the estate and even when he deals with the property for purposes not strictly binding the alienation cannot be challenged so as to defeat a *bona fide* purchaser who had no notice that the executor was using his powers for the purposes not binding on the estate(a). It makes no difference on the power of a Hindu executor even if the executrix appointed by the will is the widow of the testator. Her power of sale is as wide as any other executor if there is no restriction on her power of alienation contained in the will. The sale of the property by a Hindu widow executrix shall be deemed to be a sale by the executrix(b). It is only when his powers are restricted by the will that this clause applies and he cannot dispose of the *immoveable* property, unless he obtains the permission from Court. The Court generally removes the restriction when it is satisfied that such removal is necessary for the purposes of the due administration of the estate and may give such a permission in a fit and proper case notwithstanding the restriction(c). In a proper case the Court has jurisdiction to grant permission to sell even after the estate is completely administered(d). The object of enacting this sub-clause is to enable the Court of testamentary jurisdiction to see that the order applied for is necessary in the interest of the administration of the estate. If there remains nothing to administer, then it is the duty of the executor to hand over the property bequeathed by the will to the legatee(e).

If an executor acts in contravention of the provisions of clause (2) sub-clause (i) and sells the property without an order of the Court, the sale is not void but voidable under sub-clause (iii) (f). When an unauthorized sale is set aside, and a *bona fide* purchaser is deprived of the property, such purchaser is entitled in equity to be reimbursed for any expenditure incurred by him for improving the property, but he is not entitled to luxurious expenses(g). When the sale is not necessary for

(w) *Sinil v. Sisir*, 44 C. W. N. [289; 42 Bom. L. R. 394 (P. C.) ; 1940 I. A. 102.

(x) *Maneklal v. Keshav*, 39 Bom. L. R. 1094; A. I. R. (1938) B. 71.

(y) *Mahomed v. Hargovandas*, 47 Bom. 231.

(z) *In the goods of Nundo Lall*, 23 Cal. 908.

(a) *Namberumal v. Veeraperumal*, 59 M. L. J. 596.

(b) *Mithibai v. Meherbai*, 46 Bom. 162.

(c) *Maneklal v. Keshav*, 39 Bom. L. R. 1094.

(d) *Khetra Mohan v. Nalini Bala*, 36 C. W. N. 744.

(e) *Saryooparin v. District Judge, Allahabad*, 53 All. 422.

(f) *Sailaja v. Rishie Case Law*, 51 Cal. 135.

(g) *Maneklal v. Keshav*, 39 Bom. L. R. 1094.

administrative purposes, a *bona fide* purchaser may be protected only in certain cases(*h*).

This sub-clause only applies to *immovable* property. As regards moveable property the executor's power of disposal is not restricted.

Hindu Executor's Power to Mortgage.—Where a will gives to an *executor* power to sell the property to pay off the debts the power includes the power to mortgage unless there be some reason to be gathered from the terms of the will that it should be excluded(*i*). As regards a Hindu widow executrix's power to mortgage see *Maneklal v. Keshav*(*j*).

An administrator cannot mortgage immovable property without the leave of the Court(*k*). A permission once granted by the Court to sell the property is not sufficient to empower the administrator mortgage the property for a larger sum than the estimated value of the property(*l*).

Power to Borrow.—Apart from any special power given by will moneys borrowed by an executor on a promissory note for the benefit of the estate is not a charge upon the estate(*m*). The executor is personally liable on a contract to borrow and he cannot be sued as an executor so as to get execution against the assets of the testator(*n*). The executor is personally responsible for the payment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows it was reasonably and properly made(*o*).

Power to Lease.—The Executor's power to grant lease under sub-sec. (2) clause(1) is as wide as under sub-sec. (1) unless it is restricted by the provisions of the will. The executors of the will of a Hindu to whom sub-sec. (2) does not apply have only such authority as the terms of the will confer. Neither a power "to manage the estate as they may deem proper" nor a power to sell it will authorize the executors to grant a lease for 999 years or for any period exceeding 21 years(*p*). Under sub-sec. (2) an *executor* of the will of a Mahomedan has no power to grant lease of the testator's property for 99 years with the option to the lessee to purchase the property during the period of the lease at a stated sum(*q*).

History.

A Hindu executor was before the passing of the Hindu Wills Act only a manager, but as such he had certain powers over the estate and for many purposes he represented the testator. The grant of probate did not confer any legal character but the effect of grant was to declare the person to whom it was made to be entitled to the powers of an executor(*r*). But he was not in the same position as an executor under an English will. The property did not vest in him; he held it merely as a manager(*s*). But in *Venkata v. Ramayya*(*t*), it was held that in the case of a will not governed by the Hindu Wills Act the estate vested in the executor from the date of the testator's death if he accepted office even though probate was not obtained. Under the Hindu Wills Act the same powers were given to the executors of the wills of Hindus to which the Act applied as under the Succession Act. But the Hindu Wills Act was amended by sec. 154 of the Probate and Administration Act, the effect of which Act was to take out of the Hindu Wills Act amongst others, sec. 269 of the Succession Act X of 1865 (present section 307). Under the present Act the

(h) *Tarakeshar v. Ambica*, 55 Cal. 892.

(i) *Parthasarathy v. Mukundammal*, 45 Mad.

367; *Purna Chandra v. Nobin Chandra*, 8

C. W. N. 362; *Rajani v. Ramnath*, 3 C.

W. N. 483; see *contra*, *Kanti Chandra v.*

Kristo Churn, 3 C. W. N. 515; *Tika Ram*

v. Deputy Commissioner, 26 Cal. 707, 26

I. A. 97.

(j) 33 Bom. L. R. 1094.

(k) *Laxmidas v. Ismail*, 28 Bom. L. R. 1262.

(l) *Chawli v. Abdul*, 28 Bom. L. R. 1360.

(m) *Romanath v. Kanai Lal*, 7 C. W. N. 104

(n) *Deendra v. Radhika*, 8 C. W. N. 135.

(o) *Sudhir v. Gobinda*, 45 Cal. 538.

(p) *Jegmohandas v. Pallonjee*, 22 Bom. 1.

(q) *Mahomed v. Aishabai*, 34 Bom. L. R. 1365.

(r) *Grish Chunder v. Broughton*, 14 Cal. 862.

(s) *Sarat Chandra v. Bhupendra Nath*, 25 Cal.

103.

(t) 59 I. A. 112; 55 Mad. 443.

same is the case and there is no distinction in the powers of an executor if the deceased Hindu was governed by the Hindu Wills Act or by the Probate and Administration Act.

Sec. 90 of the Probate and Administration Act, as amended by Act VI of 1889, sec. 14 gave an executor merely the ordinary powers of sale that an ordinary owner would have in so far as they were not limited by the will and as such these powers were subject to the usual rules of equity(*u*). Sub-sec. (2) of the present section is to the same effect. He can even sell the property without obtaining probate(*v*). The only limitation over an executor is that imposed by the will. If there is no restriction in the will, his power to dispose is not dependent on the permission of the Court and the Court has no jurisdiction in the matter(*w*).

An administrator with the will annexed under the Hindu Wills Act had also the same authority as an executor under sec. 269 of the Indian Succession Act, 1865, (present section 307)(*x*).

Executors of the Will of Mahomedans.—As to the position of an executor of the will of a Mahomedan see *Sakina Bibee v. Mahomed*(*y*), (Mulla's Mahomedan Law, 12th Edn., p. 28). He is not required to prove the will. He can validly sell and convey the testator's property without taking out probate or obtaining the consent of the heirs. Under sec. 211 the property of the testator vests in him and it can be sold and conveyed under this section(*z*). If there is no restriction on the power of the executor to dispose of the immoveable property a mortgage created by a Mahomedan executor is valid. It is only incumbent on the executor of a Mahomedan will to come to Court if there is a restriction to mortgage(*a*). It is not necessary under Mahomedan law that an executor should remain an executor throughout his life. He may discharge the function of an executor for some time, but his position changes if he continues to remain in trust with the estate after the terms of the will are carried out. (See Ameer Ali's Mahomedan Law Vol. 1 p. 449). In *Saukar Nath v. Bidduthata Badi*(*b*) it was pointed out that "the duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is the executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf." Similarly an executor charged with the duties of managing a wakf may function as such only so far and so long as the estate is realized and no sooner this is done than the estate becomes the property of Government and his status as an executor automatically comes to an end. Under Mahomedan law even if mutawalis are appointed during the life-time of the wakif but an executor is also appointed at the time of his death, the executor becomes a mutawali along with mutawalis already appointed, (Ameer Ali Vol. 1, p. 450).

Under Mahomedan law an executor appointed by will can in his turn appoint an executor who takes the same place and exercises the same power as the original executor(*c*). Ameer Ali's Mahomedan law Vol. 1, pp. 448-450.

Sub-sec. (2) clause (ii).

Powers of Administrator.—This clause applies to *immoveable* property. The power of an administrator to deal with the *moveable* property is unrestricted.

(*u*) *Shri Beharilalji v. Bai Rajbai*, 28 Bom. 342.

(*v*) *Ganapathi v. Sivamalai*, 36 mad. 575.

(*w*) *In the goods of Nundo Lall*, 23 Cal. 908.

(*x*) *Ananda v. Ambica*, 47 C. L. J. 569.

(*y*) 37 Cal. 839.

(*z*) *Sir Mahomed Yusuf v Hargovandas*, 47

Bom. 231.

(*a*)¹ *Shemail v. Ahmed*, 32 Bom. L. R. 1056, in appeal, *Apronee Shemail v. Sheikh Ahmed*, 33 Bom. L. R. 1056.

(*b*) (1918) 48 I. C. 295.

(*c*) *Abdul Razak v. Ali Baksh*, 26 Lah. 544 at p. 565.

Sale.—An *administrator* under this sub-clause has no power to sell immoveable property without an order of the Court. A sale by an administrator without the Court's permission is not altogether *void* but is *voidable* at the instance of the party interested in the property and a person seeking to set aside the alienation will not be allowed to do so as to entitle him to recover the property and at the same time to keep the moneys or other advantages which he has obtained. The maxim "he who seeks equity must do equity" will apply(d). An alienation by an administrator with the permission of the Court is valid irrespective of any existence of any legal necessity(e). Leave under sub-sec. (2) will only be granted if the estate has remained unadministered(f). But in *Khetra Mohan v. Nalini Bala*(g) leave to sell was granted after the estate had been completely administered.

Mortgage.—An *administrator* has no power to mortgage or charge any immoveable property of the deceased without an order of the Court. The mortgagee cannot under such circumstances defeat the claim of the creditors of the deceased(h).

Lease.—An *administrator* under sub-sec. (2)(b) has no power to grant a lease of any immoveable property for a term exceeding five years. A lease exceeding five years is good between the lessor and lessee as it is not void but voidable(i). If the party prejudicially affected thereby seeks relief the Court will assist him on equitable terms of reimbursement. If a lease for more than five years is to be granted, the permission of the Court is necessary. But the non-compliance with this provision will not make the transaction invalid; under sub-clause (iii) it is merely voidable; and if the party prejudiced seeks relief, the relief will be granted on equitable terms(j). But an administrator has no authority to execute a permanent lease when there are no debts to be paid and no legacies to be discharged. If there is no necessity for granting the leases, the leases will be set aside without any compensation to the lessee(k).

Who can Apply for leave and when leave granted.—Under sub-sec. (2) application for leave must be made by the administrator only and not by any legatee, beneficiary or heir(l); and the application should be made after the grant(m). Leave will only be granted for the purposes of administration of the estate; if the estate is already administered leave will be refused(n). Before granting permission the Court must inquire into the truth of the matter to satisfy itself that the sale is necessary and is in the interest of the estate(o).

Appeal.—An appeal lies from an order granting leave under sub-sec. (2) to dispose of immoveable property(p).

Sub-Clause (iii).

An unauthorized sale is not void but only voidable under this sub-clause and it can only be set aside at the instance of any person interested in the property. A stranger cannot question the validity of such sale on the ground of want of permission of the Court(q). The "person interested" means a person interested independently of the executor whose alienation is sought to be avoided(r). A

(d) *The Eastern Mortgage and Agency, Ltd. v. Rebati Kumar Ray*, 3 C. L. J. 260.

(e) *Kakikhyia v. Hari Charan*, 26 Cal. 607.

(f) *Adwaita Chandra v. Krishnadas*, 42 I. C. 983; *Lakshmi v. Nanda Rani*, 3 I. C. 287.

(g) 36 C. W. N. 744.

(h) *Laxmidas v. Ismail*, 28 Bom. L. R. 1262; *Chaudri v. Abdul*, 28 Bom. L. R. 1860; *Mathuradas v. Raimal*, 37 Bom. L. R. 642.

(i) *Shubhadra v. Chandra Kumar*, 8 C. W. N. 54.

(j) *Sita Sundari v. Barada Prosad*, 28 C.W.N. 444.

(k) *Amunda v. Ambica*, 47 C. L. J. 569.

(l) *In the goods of Indra Chandra*, 28 Cal. 580.

(m) *Ram Lal v. Jugoo Mohun*, 1 C. W. N. 69.

(n) *In the goods of Nursing Chunder*, 3 C. W. N. 635; *Lakshmi Narain v. Nanda Rani*, 9 C. L. J. 116; *Haji Pu v. Tin Tin*, 2 Rang. 17; *In the Estate of Indrani*, 53 All. 422; *Lalit Chandra v. Baikuntha*, 14 C. W. N. 463; *Prosono Kumari v. Rani Chandra*, 17 C. L. J. 666.

(o) *Haji Pu v. Tin Tin*, 2 Rang. 117; A. I. R. (1924) R. 237.

(p) *Uma Charan v. Muktakeshi*, 28 Cal. 149; *Kalimuddin v. Meharui*, 39 Cal. 563, *Haji Pu v. Tin Tin*, 2 Rang. 117.

(q) *Sailaja v. Rishree Case Law*, 51 Cal. 135.

(r) *Jagobandhu v. Dwarika*, 23 Cal. 446.

holder of money decree against the estate in the hands of the administrator is not a "person interested and is not entitled to set aside the mortgage except by making restitution to the mortgagee to the extent to which the mortgagee had *bona fide* advanced money to the mortgagor(s). But in *Laxmidas v. Ismail(t)* it was held that a creditor of the deceased was a person interested because he had an interest in the estate of the deceased.

The question arising on the application to avoid alienation under this clause at the instance of the party interested is whether the Court should do so with or without making restitution to the mortgagee or the purchaser to the extent of the money *bona fide* paid. The equitable view is that the alienation will be set aside on terms and not absolutely. In *Maneklal v. Keshav(u)* it was held that when an unauthorized sale by an executor or administrator was set aside and a *bona fide* purchaser was deprived of the property purchased by him, then he was entitled in equity to be reimbursed for any expenditure incurred by him which had the effect of improving the permanent value of the property but not luxurious expenses.

Termination of Power of Alienation of Executor and Administrator.—

The power of alienation conferred on the executors and administrators enure so long as the estate remains to be administered and is to be exercised only for the administration purposes. If in the course of the winding up of the estate, it becomes necessary to sell or charge the immoveable property, the executor and administrator can pass a good title. But if the estate is once wound up completely and all the debts have been discharged and the legacies paid, the executor or administrator ceases his character as such and becomes *functus officio* and he becomes a trustee for the residuary legatee or the next-of-kin as the case may be and thereupon his powers of alienation are gone. He cannot pass any title, and the grant would in fact stand revoked, if not by a formal order of the Court(v). The leading case is *Attenborough v. Solomon(w)* where long after the administration was over the executor pledged certain article and the pledge was held to be invalid. Similarly an administrator who has paid all expenses and debts of the intestate and has cleared the estate stands in the same position towards the next-of-kin as the executor stands towards the residuary legatee. He ceases to be an administrator and becomes a trustee(x). The neglect or failure of the administrator to transfer the property to the next-of-kin does not confer upon him any right of transfer. Such a transfer will only convey the interest which the transferor has in the property(y). The case of *Attenborough v. Solomon*, was followed in *Ananda v. Ambica(z)*.

In case of property specifically bequeathed by will, the executor's power to dispose of such property for administrative purposes subsists as long as assent to such legacy is not given under sec. 333, see ill (i). After once the executor has given his assent he cannot deal with that property(a).

In what cases an Alienation by an Executor or Administrator may be impeached.—*Fraud* and *collusion* will vitiate any transaction and, therefore, if fraud is proved the transaction may be set aside. Generally an alienation will be set aside in the following cases :—

(a) If the property is sold at a *nominal* price or at a *fraudulent undervalue*(b).

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| (s) <i>Zollikoper & Co. v. O. A. O. K. K. M. Chettyar</i> , 9 Rang. 34. | 1 Cal. 21 at p. 33. |
| (t) 28 Bom. L. R. 1262. | (w) (1913) A. C. 76. |
| (u) 39 Bom. L. R. 1094; (1938), Bom. 71 (see also <i>Sinaya v. Munisami</i> , 22 Mad. 289; <i>Eastern Mortgage and Agency Co. Ltd. v. Rebat Kumar</i> , 3 C. L. J. 260; <i>Sitasundari v. Baroda</i> , 28 C. W. N. 444.) | (x) <i>In re Ponder</i> , (1921) 2 Ch. 39. |
| (v) <i>Kulwantha Bewa v. Kanam Chand</i> , (1939) | (y) <i>Vertannes v. Robinson</i> , 29 Bom. L. R. 1017 at p. 1024. |
| | (z) 47 C. L. J. 569; see also <i>Sankar v. Bidaitlata</i> , 28 C. L. J. 271. |
| | (a) <i>Marie v. Jotindra</i> , 28 C. L. J. 141. |
| | (b) <i>Scott v. Tyler</i> , 2 Dick. 712. |

(b) Where the alienation is made by the executor for the payment of his own debt.

(c) Where the alienation is made by the executor for other private purposes of his own(c).

(d) If a chattel is specifically bequeathed, the sale of the chattel by the executor will be set aside if it is proved that the purchaser had notice of the same and of the fact that there were no debts of the testator or that they have since been discharged(d).

(e) If a great *length of time* has elapsed since the testator's death, it will be presumed that all the debts of the testator have been discharged, and that the alienation was for a purpose foreign to the administration of the deceased's estate(c).

308. An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

General powers of administration.

(a) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

[This is sec. 269-A of the Succession Act X of 1865 and sec. 90-A of the Probate and Administration Act V of 1881.]

This section was added as sec. 269-A to the Succession Act X of 1865 by Act XVIII of 1919. By this section additional powers are conferred on the legal representatives by an express enactment.

Clause (a).

Management of the Estate.—A legal representative has power to incur expenditure for the proper management of the estate of the deceased. If the property is in disrepair he has power to incur expenditure to put it in proper repairs. In all such acts with regard to the management of the property entrusted to him, he must act with the same degree of care as a man of ordinary prudence would in his own affairs(f). Before the introduction of this section a legal representative's power to spend moneys for the improvement of the property was doubtful(g). Clause (b) now empowers him to spend a reasonable and proper sum for such improvement with the sanction of the High Court, (see pp. 531-532).

If the deceased has left outstandings the legal representative has power to file suit to recover the same and to incur the necessary expenditure for that purpose. He has also power to defend any action that may be brought by any person in respect of the estate of the deceased. He has also power to compromise such suits(h), but the compromise must be *bona fide* and in the interest of the estate(i). But if a compromise is prejudicial to the estate or is in excess of the powers of the

(c) *M'Leod v. Drummond*, 17 Ves. 155.

(d) *Ewer v. Corbet*, 2 P. W. 149.

(e) *Re Verrell's Contract*, (1903) 1 Ch. 63.

(f) *Lukmanchand v. Jai Kuberai*, 29 Bom. 170.

(g) *Ouchterlony v. Ouchterlony*, 11 Mad. 360.

(h) *Srimati v. Mrs. F. A. Savi*, 12 Pat. 359 at 371.

(i) *Chidambara v. Krishnasami*, 39 Mad. 365.

legal representatives, it will not be binding on the estate(*j*). (Williams on Executors, 12th Edn., p. 1185.)

Arbitration.—An executor has ordinarily no power to make a reference to arbitration with the avowed purpose that the terms of the will may be modified. Questions of law including questions of construction may be referred to arbitration but they cannot add or alter the will(*k*).

Where the executor or administrator submits in broad terms, to pay whatever shall be awarded and the arbitrator awards that he shall pay a certain sum, he is personally bound to carry out the award, whether he has assets or not(*l*). If the executor or administrator wants to exonerate himself from personal responsibility he must, before submission, signify that he will be responsible only to the extent of the assets of the deceased in his hands and no more, whatever the award of the arbitrator may be. (Williams on Executors, 12th Edn., p. 1168).

Power to employ Agents and Servants.—As a rule the legal representative ought not to employ an agent to perform the duties which he has taken upon himself. He cannot delegate his power by a general or special power of attorney(*m*). A power of attorney, in so far as it delegates to an attorney power to exercise discretion to sell immoveable property is void(*n*). But if there are monthly rents to be collected, he may employ a rent collector(*o*). If the nature of the accounts require, he can engage an accountant(*p*). He is also entitled to employ and charge for the services of a solicitor which he could not do himself(*q*). If the beneficiaries dispute the charges of the solicitor, either before or after the payment, they may have the bill taxed, (Halsbury, Vol. 14. p. 325 and Hailsham Edn., Vol. 14. pp. 429-430).

Performance of Contracts.—It is the duty of the legal representatives to perform all the contracts of his testator or intestate by way of specific performance or otherwise. In the case of onerous contracts he ought not to neglect any opportunity of coming to terms with the other contracting party which may benefit the estate. Breaking of an enforceable contract is an unlawful act and it is not his duty to commit such an act(*r*).

Powers of Executors to carry on Business.—If the deceased was a partner in a firm the general rule of law is that in the absence of any direction in the will, the executor is entitled to have the whole concern wound up and disposed of. If the surviving partners continue to trade, the legal representative of the deceased partner may elect to take his share of the profits, or may charge the survivors with interest on the amount of capital retained and used by them(*s*), (Williams on Executors, 12th Edn., pp. 1171-1177).

If the deceased carried on business alone his legal representatives have no power to carry on the business except for the purpose of winding it up, unless the will empowers the executors to do so(*t*). The executors have no right to carry on the business for an indefinite period in the absence of any authority in the will or an order of the Court. Their only right is to realize the assets of the business as quickly as possible and to wind it up. If they carry on the business and incur debts they become personally liable to the creditors and will have no general right of indemnity out of the estate(*u*). An administrator is not entitled to

(*j*) *Sarbesh v. Hare*, 14 C. W. N. 451; *De*

Cordova v. De Cordova, 4 App. Cas. 692.

(*k*) *Soudamini v. Gopal Chandra*, 19 C. W. N. 948.

(*l*) *Pearson v. Henry*, 5 Term. Rep. 7.

(*m*) *Bonnerji v. Sitanath*, 24 Bom. L. R. 565.

(*n*) *Jogendra Chunder v. Apurva Dasi*, 18 C. W. N. 1190.

(*o*) *Wilkinson v. Wilkinson*, (1825) 2 Sim.

& St. 237.

(*p*) *Henderson v. M'Iver*, (1818) 3 Madd. 275.

(*q*) *Harbin v. Darby*, (1860) 28 Beav. 325.

(*r*) *Ahmed v. Estate and Trust Agencies Ltd.*, (1938) A. C. 625.

(*s*) *Jairam v. Kuverbai*, 9 Bom. 491.

(*t*) *Collinson v. Lister*, 30 Beav. 356.

(*u*) *Sudhir Chandra v. Rasseswar*, 35 C. L. J. 46.

continue the business of the deceased except for winding it up(v). A general power in the will giving discretion to the executors to postpone the conversion of the estate would enable an executor to carry on the business for a reasonable period to enable him to sell it as a going concern(w). If the will does not authorize the executor to carry on the business, still it is his duty to preserve the business as an asset and if he acts *bona fide* he is not liable for breach of trust for continuing it for some years(x). Beyond that the executor has no power to carry on the business(y). Even when the will empowers the executor to carry on business, the executors are not thereby empowered to embark upon new enterprise; they should continue only the business carried on by the deceased(z). In carrying on the business it is incumbent on him to act with the same degree of care as a man of ordinary prudence would in his own affairs. If he appoints an agent and it is shown that he was negligent both in the selection and supervision of the agent and the loss sustained by the estate can reasonably be connected with the want of such diligence, the loss will fall on the executor(a).

An executor who is authorized to carry on business is not entitled to employ in the business any of the general assets of his testator beyond the fund directed to be so employed: if the testator has not directed any assets to be so employed the executor is only entitled to employ the assets already embarked in the business(b). If he is authorized to use the general assets he can do so but there must be express authority for this(c). In *Ma Sein v. S. R. M. M. Chetty*(d) the executors created an equitable mortgage of the testator's general estate for carrying on the business in which the testator had been a partner and it was held that by reason of sec. 269 of the Act of 1865 the executor had an unqualified right to mortgage the property. But this decision has not been approved. It was observed that it was apparently not realized that the section did not extend the powers of an executor beyond those conferred by the law of England and the principles embodied in the English decisions had application. It was observed that in respect of the powers of the executor to carry on the business there was no difference in the Indian law from the law of England and the principles laid down in the English decisions applied. If the will authorises the executor to pledge the "credit" of the business for the purposes of carrying it on the power is limited to the trade assets and it is improper to utilise the general assets for the purpose of carrying on the business. If the will does not confer upon the executor the power to charge the general assets, the mortgage by executor for the purpose of business on the general estate is invalid in law(e). If the executor finds it impossible to carry on the business with the funds already employed in it his duty is to apply to the Court for direction. He has no power to borrow and charge the estate for that purpose(f).

His Liability.—The executor is personally liable upon all contracts into which he enters and for all debts which he incurs in carrying on the testator's business whether he is authorized to carry or not but he is entitled to be indemnified out of the assets for all liabilities properly incurred in carrying on the business even in priority to the claims of the creditors of his testator, when he has carried on for such reasonable time as is necessary to enable him to sell the business as a going

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| (v) <i>Kuberdas v. Jerkish Naoroji</i> , 43 Bom. L. R. 981. | (b) <i>Re Hodson, Ex-parte Richardson</i> , (1818) 3 Madd. 138. |
| (w) <i>Re Chancellor, Chancellor v. Brown</i> , 26 Ch. D. 42. | (c) <i>Cutbush v. Cutbush</i> , 1 Beav. 184. |
| (x) <i>Garrett v. Noble</i> , 6 Sim. 504; <i>Dowse v. Gorton</i> , (1891) A. C. 190. | (d) 3 Rang. 443. |
| (y) <i>Jamselji v. Hirjibhai</i> , 37 Bom. 158. | (e) <i>Italia v. Mahomed</i> , (1940) Mad. 211 (in appeal from <i>Dinshaw v. Mohamed</i> , A. I. R. (1939) M. 922. |
| (z) <i>Sookemam v. Rahimnula</i> , 6 Bom. L. R. 800. | (f) <i>M'Neille v. Aeron</i> , (1858) 4 De. G. M. & G. 744. |
| (a) <i>Lakshmi Chand v. Kuwerbai</i> , 29 Bom. 170. | |

concern(g). When an executor carries on the business whether he does so for the purpose of winding it up or of making it over as a going concern to the person entitled to it, there does not appear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator's estate. The responsibility rests entirely on him subject only to his ultimate right to be indemnified out of the estate(h).

Where an executor expressly mortgages under a power to carry on business, this is only one instance of notice that the executor is not acting as executor in other words that he is mortgaging as what has been described in cases as testamentary trustee(i). Therefore if the mortgage is beyond the scope of the power in question the mortgagee is deemed to have been taken with notice. Sections 307 and 308 do not lay down any different principle of law from English cases. The Indian Succession Act does not deal with the position of a transferee at all. It only deals with the incumbrance or a transfer by an executor *qua* executor and not in any other capacity.

The real question where an executor mortgages his testator's property expressly under a power to carry on business in India as in England is in each case whether the power authorises him to deal with the property in question. In this connection three stages arise: (1) that the property mortgaged in question is excluded by the will from the operation of the power, (2) that it has been expressly devoted to the business and is therefore within the power and (3) when nothing is said about the property at all. The test to be applied in each case is what was the scope of the business which the testator has authorised his executor to carry on and what assets the testator embarked in or devoted to the business or designated as being assets which the executor was entitled to use. In each case this is a question of fact.

There is another aspect of the Indian law where the executor of a joint Hindu family business is empowered to carry on the business of the testator. In those cases the executor has wider powers than to an executor under the Indian Succession Act. This principle, however, of wider power is not borne out by the following cases: *Sudhir Chandra Roy v. Gobinda(j)*, *Srishchandra v. Sudhir Krishna(k)*. In the first case there is no power given by the will to carry on business but the executor in fact carried on business. It was argued that the executor was manager according to Hindu law and therefore he had wider powers than those of an executor according to English law. This argument was put forward unsuccessfully, (see pages 545-46 of the report). In the second case this argument was dropped. It is, therefore, clear that the law in India as regards the power of executor to carry on joint Hindu family business is the same as that of an executor under the Indian Succession Act. As regards loans by an executor see *Farhall v. Farhall(l)*: *Romanath v. Kanai Lal(m)* and *Satya Prasad v. Motilal(n)*. All these cases are discussed in *Srishchandra v. Sudhir Krishna(o)*.

Unsecured loans by executors.—The principle applicable to unsecured loans by executors on personal security is as follows:—

(1) The lender is creditor of the estate only in certain anomalous cases. In all other cases the executor is the debtor personally. A claim for money lent to the executors can only be enforced against them personally and the creditor is not entitled to a judgment directly against the assets of the testator(p). (2) The

(g) *Dowse v. Gorton*, (1891) A. C. 190; *Labouchere v. Tupper*, 11 Moo. P. C. 198; *Deben-dra v. Hemichandra*, 31 Cal. 253; *Vishwanath v. Raghunath*, 40 Bom. L. R. 458 at p. 461; A. I. R. (1938) B. 344.

(h) *Sudhir v. Gobinda*, 45 Cal. 538.

(i) *In re Morgan, Pillgrem v. Pillgrem*, 18 Ch. D. 98.

(j) 45 Cal. 538.

(k) 59 Cal. 216.

(l) 7 Ch. 128.

(m) 7 C. W. N. 104.

(n) 27 Cal. 683.

(o) 59 Cal. 216 at p. 222.

(p) *Byramjee v. Heerabai*, 11 Bom. L. R. 250; *Ramanath Paul v. Kanailal*, 7 C. W. N. 104; *Chandra Narayan v. Ramchandra*, A. I. R. (1946) Pat. 66.

creditor may have an indirect right against the estate by subrogation to the executor's right of indemnity. If the creditor claims subrogation, it is necessary that the rights of the executor to the indemnity is established, before the creditor can be subrogated to such a right(g). The rights of the lender are more exclusive than those obtained by subrogation as being incidentally referred to in *Sakarbai v. Magonlal(r)*.

As regards the right of subrogation by the creditors, see *In re Johnson(s)*. The view taken in this case has been consistently followed in India(t).

The principles to be deduced from these cases are as follows :—

- (1) The lender has a right to the benefit of the executor's right in the estate.
- (2) Lenders are not entitled to a benefit even where the executor has a right.
- (3) Lenders have no right where the executors have no right.
- (4) It must be established that the executor has a right of indemnity.
- (5) And the scope of the executor's right is to be determined by Court that is to say the extent of the properties out of which he may claim to be indemnified and that there are no conditions which defeat the executor's right of indemnity.

The above principles are clearly laid down in *Suneel Kumar v. Shishirkumar(u)*. In this case the testator had mixed up the accounts of his property with those of his business but the direction in the will to the executors was that they should carry on the business and the executors were authorised to mortgage the property for the purpose of the business. It was held that the mortgages effected by the executors were valid. In *Labouchere v. Tupper(v)* the Privy Council held that an executor of a trader carrying on the trade was personally liable for debts contracted in the trade and creditor could not be deemed to be the creditor of the testator or had a charge on the assets. But the view taken in *In re Johnson(w)*, is that where a trader has by his will directed an executor to carry on his business and to employ a specific portion of his estate for the purpose, the rule is, that, though the executor is personally liable for debts incurred by him in carrying it on pursuant to the will, he has a right to resort for his indemnity to the specific assets so directed to be employed but no further; and consequently the creditors of the trade are entitled to stand in the place of the executor and to claim the benefit of that right. The law on this subject is summarised in *Ammalu Ammal v. Namagiri Ammal(x)*.

Creditor's Remedy.—Any person dealing with the executor carrying on business must rely on the personal liability of the party conducting it and the creditor's only remedy will be to proceed against the executor personally and the executor will be personally liable without any right of indemnity(y). The creditors of the executors have no *prima facie* right to the property of the deceased(z). The highest right that a creditor may claim against the estate on the finding that it has been enriched or benefitted by the money is a right to be subrogated to the right of the executor, i.e., to be indemnified out of the estate to the necessary extent. The right of the executor to be indemnified must be established(a). To entitle the creditor a direct recourse to the estate of the deceased, it must be proved that

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| (g) <i>Maharaja Sir Manindra Chandra v. Sudhio Krishna</i> , 35 C. W. N. 850; 53 C. L. J. 589. | (u) 62 Cal. 552. |
| (r) 26 Bom. 206. | (v) 11 Moo. P. C. 198. |
| (s) 15 Ch. D. 548. | (w) 15 Ch. D. 548. |
| (t) See <i>In re Shard</i> , 28 Cal. 571; <i>Sudhir Chandra v. Gobinda</i> , 45 Cal. 538; <i>Srish-chandra v. Sudhirkrishna</i> , 59 Cal. 216 at p. 228. | (x) 33 M. L. J. 631; 43 I. C. 760. |
| | (y) <i>Kirkman v. Booth</i> , 11 Beav. 273. |
| | (z) <i>In re Shard</i> , 28 Cal. 574. |
| | (a) <i>Srishchandra v. Sudhirkrishna</i> , 59 Cal. 216. at 228; <i>Bridge v. Madden</i> , 31 Cal. 1084. |

the executors were borrowing according to the directions contained in the will(b). If he relies on the credit of the testator's estate he should look to the will to ascertain the extent to which the testator has authorized his assets to be embodied in the trade. Where the will directs the executor to carry on the trade and to employ a specific portion of the estate for that purpose the rule is that though the executor is personally liable for the debts incurred in carrying on the trade, he has a right to resort for his indemnity to the specific assets so directed to be employed but no further and consequently the creditors of the trade are entitled to stand in the place of the executor to claim the benefit of that right so as to obtain the payment of their debts. But this rule does not apply where the executor is in default to the specific estate devoted to the trade. In such a case the defaulting executor not being himself entitled to an indemnity except upon terms of making good his default, the creditor is in no better position and is not entitled to have his debt paid out of the specific assets unless the default is made good(c). Where the assets of the testator consisted of a banking business which was of a hazardous character and without any capital and the will contained no direction to carry on the business but the executors without taking any direction from the Court continued the business for 7 years with borrowed money, it was held that the executors were personally liable for the debts incurred and they had no right to indemnity out of the estate(d). If no specific assets are directed to be employed in the business the executor shall have his indemnity out of the assets employed in the business at the time of the testator's death(e).

An administrator is only entitled to carry on the business of the intestate for the purpose of realization and for winding it up and if he does any more than this he renders himself personally liable for the debts so incurred without any right of indemnity out of the intestate's estate(f).

Where an executor carries on the business under power given in the will in, an administration action, the debts so incurred will carry interest as from the date of the certificate of the Commissioner: but the creditors of the deceased are entitled to interest from the date of order of administration(g).

Clause (b).

By this clause the High Court alone is empowered to sanction the following expenses:—

(a) a reasonable and proper sum for religious and charitable objects, e.g., for proper religious ceremonies usually performed by the members of the community to which the deceased belonged. This does not mean expenses for funeral ceremonies which are expressly provided for by sec. 316. As regards charitable objects if it is customary to give alms to the poor or to feed Brahmins or give caste dinner a reasonable sum having regard to the value and status of the deceased may be allowed to be spent by the legal representative of the testator with the sanction of the Court.

(b) Expenses for the Improvement of Property.—As to what are improvement expenses will depend on the facts of each case. Ordinarily a legal representative is entitled to carry out repairs to the property, but not to improve

- (b) *Thirunavukkaram Pandaram v. Purushottam Lakshmidas Ltd.* A. I. R. (1938) M 890; 159 I. C. 266; (1935) M. W. N. 1186.
 (c) *In re Johnson*, 15 Ch. D. 548 followed in *Dinshaw v. Mohamad*, 1 I. R. (1939) M. 922.
 (d) *Sudhir Chandra v. Banerjee*, 35 C. L. J.

- 46; A. I. R. (1921) C. 419.
 (e) *Jeihabhai v. Chotalal*, 34 Bom. 209.
 (f) *Re Evans*, 34 C. D. 597; *Re W. J. Cory*, (1903) P. 62; *Kuberdas v. Jekish Naoroji*, 43 Bom. L.R. 981, A. I. R. (1942) B. 54.
 (g) *In re Bracey, Hull v. Johns*, (1936) 1 Ch. 690.

it(*h*). Putting a new staircase into an old house is not an improvement(*i*). Under this clause a legal representative can apply to the Court for spending a reasonable and proper sum for the improvement of the estate.

309. An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator General's Act, 1913.

[This is sec. 269-B of the Succession Act X of 1865 sec. 90-B of the Probate and Administration Act, V of 1881]

Commission and Agency Charges.—This section was added as sec. 269-B by Act XVIII of 1919. It enables an executor or administrator to stipulate for payment of commission within the limits laid down in the Administrator General's Act of 1913, (see sec. 42 of the Administrator General's Act III of 1913). The fees are charged by the rules framed under the said Act. The percentage is to be calculated on the income and not on the corpus(*j*), and on the value of the assets collected by him and not only on the net value of the assets(*k*).

Ordinarily a legal representative is not entitled to any allowance for his time and trouble; he is only entitled to out-of-pocket expenses(*l*). He cannot claim commission for collecting rents or any allowance for carrying on the testator's business(*m*), but in special cases the Court may allow him remuneration for acts done in connection with the estate. In *Narayan v. Shajani*(*n*) an executor before taking out probate had stipulated for remuneration and was agreed to. He was allowed commission at the agreed rate and the agreement was not held to be void against public policy. In *Aga Mahomed v. Koolsom Bee Bee*(*o*), their Lordships of the Privy Council held that if a will empowers executors to charge commission, it should be regarded as a legacy and not as a debt and as a Mahomedan cannot bequeath more than a third of his estate the commission was payable out of the bequeathable third.

The rule that the representative is not entitled to any allowance for his time and trouble applies to the case of a solicitor-executor or solicitor-administrator. In the absence of a special clause in the will authorizing him to charge for professional services, he is only entitled to out-of-pocket expenses and not for profit costs; also the firm of which he may happen to be a partner is entitled to no larger allowance, although all the business may have been transacted by his partner, (*Halsbury*, Vol. 14, p. 425).

But if the will authorizes the executor-solicitor to charge and be paid for his services the usual form is "to charge and be paid the usual professional charges for the business done by him or his firm in relation to the execution of trusts whether in the ordinary course of his profession or business or not, and although not of a nature requiring the employment of a solicitor or other professional person." This will enable the solicitor to charge for any work done by him in the course of his profession or business(*p*). To entitle a solicitor to the professional charges there must be clear words in the will. An authority to a solicitor-executor to make professional charges is a legacy and if the solicitor attests the will containing such

(*h*) *Ouchterlony v. Ouchterlony*, 11 Mad. 360.

(*i*) *Sidramappa v. Siddappa*, 31 Bom. 1.. R. 461.

(*j*) *Lloyd v. Webb*, 24 Cal. 44; *In the goods of Courjon*, 25 Cal. 65.

(*k*) *Watkins v. Sarat Chunder Ghose*, 31 Cal. 572 at p. 582.

(*l*) *Robinson v. Pett*, (1734) 3 P. Wms. 249.

(*m*) *Burden v. Burden*, 1 Ves. & B. 170.

(*n*) 22. Cal. 14.

(*o*) 24 I. A. 196.

(*p*) *Gungabai v. Bhugwandas*, 32 I. A. 142; *Clarkson v. Robinson*, (1900) 2 Ch. 722.

a clause, he will lose the benefit provided for him(*q*). It also cannot take effect when the estate proves insolvent(*r*).

310. If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property.

[*This is sec. 270 of the Succession Act X of 1865 and sec. 91 of the Probate and Administration Act V of 1881.*]

This section is based on the rule that a legal representative shall not derive any pecuniary benefit from his office. He may not directly or indirectly purchase any portion of the assets from himself. He cannot buy debts due to the estate or legacies at less than their full amount and the purchase will be set aside in favour of the legatees who sold their interests. It will not operate as a release for the benefit of the co-legatees, (Halsbury, Vol. 14, p. 323). Similarly one of several legal representatives cannot sell to another either directly or indirectly(*s*).

The fact that the executor has not taken out probate is immaterial(*t*). Such a purchase is regarded as a breach of trust without inquiry. But an executor who has renounced probate or has not proved the will nor has acted in any manner may purchase the property(*u*). A purchase by an executor or administrator is always looked upon with suspicion even if he pays a fair value(*v*), (Williams on Executors, 12th Edn., pp. 567, and 1207). The transaction is not void but the slightest circumstance giving rise to suspicion will be enough to set it aside(*w*), and in this respect an executor *de son tort* stands on the same footing(*x*).

It may be noted that the section does not admit of any exception and therefore even though a sale to an executor might have been made with the sanction of the Court the voidable nature of the sale would remain.

An executor who has once accepted the office is also estopped from setting up an adverse title to the property of the deceased(*y*). In order to enable him to do so he must first obtain a proper discharge(*z*).

The restriction laid down in this section does not apply when the legal representative purchases the property from the legatees. But the sale would still be regarded with suspicion because *qua* the legatee the executor stands in the position of a trustee and the Court will watch such a transaction with the utmost jealousy(*a*).

A surviving partner may buy the property in trade of his deceased partner ; but inasmuch as his interest in the transaction may conflict with his duty, he is even precluded by sec. 88 of the Indian Trusts Act from retaining for himself any advantage he may have acquired by the bargain. He must show that he gave full value for the property. The only protection afforded in such a case is by sec. 96 of the Trusts Act(*b*).

(*q*) *Re Barber*, 31 C. D. 665.

(*r*) *Re White, Pennell v. Franklin*, (1898) 2 Ch. 217.

(*s*) *Cook v. Collingridge*, (1823) Jac. 607.

(*t*) *Munisami v. Maruthammal*, 34 Mad. 211.

(*u*) *MacIntosh v. Barber*, 7 Moore 315; *Clark v. Clark*, 9 A. C. 733; *Barada Proshad v. Gajendra Nath*, 13 C. W. N. 557.

(*v*) *Nugent v. Nugent*, (1908) 1 Ch. 546.

(*w*) *Hasanali v. Esmailji*, 9 Bom. L. R. 606; *Vaughan v. Heseltine*, 1 All. 753.

(*x*) *Gokuldas v. Valibai*, 15 Bom. L. R. 343.

(*y*) *Subodhchandra v. Bhupalika*, 60 Cal. 1406.

(*z*) *Srinivasa v. Venkatavarada*, 34 Mad. 257; 38 I. A. 129; *Munisami v. Maruthammal*, 34 Mad. 211; *Fazlehussain v. Mahomedally*, (1943) Bom. 495.

(*a*) *Barada v. Gajendra*, 13 C. W. N. 557; *Raja Peary Mohan Mukerji v. Monohar Mukerji*, 48 I. A. 258; 23 Bom. L. R. 913.

(*b*) *Hasanali v. Esmailji*, 9 Bom. L. R. 606.

311. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Powers of several executors or administrators exercisable by one.

Illustrations.

- (i) One of several executors has power to release a debt due to the deceased.
- (ii) One has power to surrender a lease.
- (iii) One has power to sell the property of the deceased whether moveable or immoveable.
- (iv) One has power to assent to a legacy.
- (v) One has power to endorse a promissory note payable to the deceased.
- (vi) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

[This is sec. 271 of the Succession Act X of 1865 and sec. 92 of the Probate and Administration Act V of 1881.]

Where there are several executors the powers of all may be exercised by any one of them, unless there is anything to the contrary in the will(c). Ill. vi shows that the powers of one of several executors may be restrained when the testator directs that two or more of his executors shall be a quorum. Similarly the grant of probate to one of several executors empowers the executor to whom it is granted with all the powers in spite of the fact that the testator intended that all his executors should join in alienating the property(d).

This section only applies where it is compulsory to obtain probate, before dealing with the property(e). The restrictions contemplated in this section may be either in the will or in the grant.

What one of several executors or administrators can do.—Co-executors, however numerous, are regarded in law as an individual person and consequently when several executors prove the will the acts of any one of them in respect of the administration are deemed to be acts of all unless the testator directs that all his executors shall act jointly; where there is no such direction they have all a joint and entire authority over the whole property(f). Where a testator appoints several executors and directs that they should act jointly and if only one executor obtains probate, others renouncing or refusing, the proving executor can exercise the powers alone(g).

One of several executors may—

- (1) Release a debt(h), (ill. i.) But such a release can only be made when the debt subsists as a debt due to the deceased and not when it has merged into a decree(i).
- (2) Renew a barred debt(j).
- (3) Settle an account with a person accountable to the estate and in the absence of fraud it will be binding on the other executors(k).
- (4) Surrender a lease, (ill. ii.)
- (5) Assent to a legacy (ill. iv.)

(c) *Rani Hemanjini v. Sarat Sundari*, 34 C L. J. 457.

(d) *Saty Prasad v. Motilal*, 27 Cal. 683.

(e) *Chidambara v. Krishnasami*, 39 Mad. 865.

(f) *Padmanabha v. Williams*, 23 Mad. 239.

(g) *Saty Prasad v. Motilal*, 27 Cal. 683.

(h) *Jacomb v. Harwood*, 2 Ves. Sen. 267.

(i) *Lachman Das v. Chaturbhuj*, 23 All. 252.

(j) *Alamuri v. Venkata*, 42 M. L. J. 559; A. I. R. (1922) M. 214; *Administrator-General v. Hawkins*, 1 Mad. 267.

(k) *Smith v. Everett*, 27 Beav. 446.

- (6) Sell the property of the deceased, moveable or unmoveable. (ill. *iii.*) but the conveyance must be executed by all the executors who have proved the will (See Halsbury Vol. 14, p. 292.)
- (7) Give a valid receipt and give a good discharge(*l*).
- (8) Endorse a promissory note, (ill. *v.*)
- (9) An acknowledgment by one executor is sufficient to prevent limitation(*m*). (Halsbury Vol. 14, p. 327.)
- (10) An executor who has not proved the will but whose right to prove is reserved can call for an inventory and account from his co-executors who have proved the will(*n*).
- (11) Assent to a legacy, and his own assent to his own legacy will be sufficient(*o*) (ill. *iv.*)

One of several administrators stands on the same ground as one of several executors(*p*).

What one of several executors or administrators cannot do.—

- (1) One of several co-executors cannot bind the others by his contracts(*q*).
- (2) One of several co-executors cannot file a suit, (see O. 31 r. 2. Code of Civil Procedure). They must all join in filing suits. If any of them refuses, he may be made a defendant to the suit(*r*). But if one of several executors has alone proved the will, he may sue without making the other executors parties.
- (3) One of several joint decree-holder executors cannot give a valid discharge for the amount of the joint decree(*s*).

312. Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

Survival of powers on death of one of several executors or administrators

[*This is sec. 272 of the Succession Act X of 1865 and sec. 93 of the Probate and Administration Act V of 1881.*]

Upon the death of one of several legal representatives the office, with its incidents, duties, powers, and the interest in all the property vested in them by virtue of their office, devolves upon the survivors or survivor. Sec. 226 also provides that when probate has been granted to several executors and one of them dies, the entire representation accrues to the surviving executor or executors. The words "in the absence of any directions to the contrary in the will" indicate that the directions must be contained in the will and not in the grant as under sec. 311.

The powers which become vested in the survivors or survivor are incidental to the office(*t*). Where a special power or special direction is given to a particular executor personally by reason of special confidence in him such power does not survive(*u*).

Powers of administrator of effects unadministered.

313. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

(*l*) *Charlton v. Durham*, 4 Ch. App. 433.

(*m*) *Re Macdonald*, (1897) 2 Ch. 181.

(*n*) *Jehangir v. Bai Kukibat*, 27 Bom. 281.

(*o*) *Townson v. Tickell*, 3 B & A. 81.

(*p*) *Willand v. Fern*, 2 Ves. Sen. 267; *Comb v. Harwood*, 2 Ves. Sen. 267.

(*q*) *Turner v. Hardey*, 9 M. & W. 770.

(*r*) *Smith v. Smith*, Yelv. 180.

(*s*) *Lachman Das v. Chaturbhuj*, 28 All. 252.

(*t*) *Barada v. Gajendra*, 18 C. W. N. 557.

(*u*) *Amritlal v. Surnomoyi*, 24 Cal. 589.

[This is sec. 213 of the Succession Act X of 1865 and sec. 91 of the Probate and Administration Act V of 1881.]

The word "effects" used in this section is synonymous with "property" (v).

This section enacts that an administrator *de bonis non* is entitled to all the property which have remained unadministered by the first executor or administrator, and he acquires the same power of disposal as the original executor or administrator. If the original executor or administrator has fraudulently alienated the effects for his own use in collusion with the purchaser, such effects will be considered as unadministered and will pass to the administrator *de bonis non* who may apply to have the sale set aside(w).

Powers of administrator during minority.

314. An administrator during minority has all the powers of an ordinary administrator.

[This is sec. 274 of the Succession Act X of 1865 and sec. 95 of the Probate and Administration Act V of 1881.]

An administrator during minority has the same powers over the property of the minor as an ordinary administrator. The limit of his administration is the minority of the person entitled to the property, there is no other limit.

Powers of married executrix or administratrix.

315. When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

[This is sec. 275 of the Succession Act X of 1865 and sec. 96 of the Probate and Administration Act V of 1881.]

This section is now superfluous having regard to the amendment made in sections 223 and 236 by Act XVIII of 1927. Previous to that Act a grant could not be made to a married woman without the previous consent of her husband. The powers of a married executrix or administratrix are the same as any other executor or administrator.

CHAPTER VII.

Of the Duties of an Executor or Administrator.

316. It is duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

As to deceased's funeral.

[This is sec. 276 of the Succession Act X of 1865 was as follows: "It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose." The present section is in accordance with sec. 97 of the Probate and Administration Act V of 1881.]

The section mentions only *executor*; but it is submitted the same would apply to an *administrator*.

A man cannot dispose of his body by his will and after death the custody and possession of the body belong to his executors until it is buried(x). But it is the duty of the executor to give effect to the wishes of the deceased and if the deceased has left no directions, the executor must dispose of the body in the usual manner prevailing in the community and the caste to which the deceased belonged, *e.g.*,

(v) *Rawlings v. Jennings*, 13 Ves. 39.

540.

(w) *Cutbidge v. Boatwright*, 1 Russ. Ch. Cas.

(x) *Williams v. Williams*, 20 C. D. 639.

a Christian is entitled to a Christian burial(*x*¹), a Hindu to a Hindu burial. The executor would not be justified, to gratify his own fancy, without the deceased's sanction, in cremating the body. An executor in England could not cremate a body without the sanction of the deceased(*y*), but cremation has now a statutory sanction in England by Cremation Act, 1902, (Williams on Executors, 12th Edn., pp. 610-611).

The deceased should be buried in a manner suitable to the estate he leaves

What funeral expenses will be allowed. behind and funeral expenses according to the degree and quality of the deceased are allowed(*z*). Expenses for this purpose will have precedence over all other liabilities, (sec. 320).

But the executor or administrator will not be justified in incurring extravagant expenses and if the estate is insolvent no more shall be allowed than those which are absolutely necessary(*a*). No precise sum can be fixed, it must vary in every case according to the station in life of the deceased and the community to which he belonged. Where funeral and testamentary expenses are directed to be paid out of a legacy and not out of the general estate of the testator such expenses are to be paid out of the legacy(*b*). In *Mullick v. Mullick*(*c*), on an appeal to the Privy Council from Bengal it was held with respect to the expenses of the funeral of a Hindu testator, that, as the will gave no directions how they were to be performed, the only question to be considered was whether the sums allowed for their performance were more than had usually been expended at the funeral of persons of the same rank and fortune as the deceased.

With respect to the liability of an executor or an administrator for the funeral expenses if the executor gives orders for the funeral or ratifies or adopts the acts of another party who has given such orders he makes himself liable personally for reasonable expenses(*d*). Also an administrator if before taking out letters he gives orders or sanctions orders given by another for the funeral of the deceased he will be bound, after he has become administrator to satisfy the charges incurred(*e*). A question, however, of some difficulty arises where the executor or administrator has neither given nor adopted any orders for funeral. It would seem, however, that under this section an executor or administrator having assets will be bound in point of law without any express contract for the payment of the funeral expenses of his testator, suitable to his degree(*f*). The funeral expenses and the expenses of "Shradh" ceremonies under Hindu law are in the nature of legal charges and if a person is obliged to defray these expenses then the estate is liable to pay the same in the first instance, (sec. 320). If such person is in lawful possession of the estate and during that possession he is obliged to incur such expenses which are binding on the estate, he may claim a lien for the same(*g*).

317. (1) An executor or administrator shall, within six months from the grant of probate or letters of

Inventory and account.

administration, or within such further time as the Court which granted the probate or letters may

appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the

(*x*¹) *R. v. Stewart*, 12 A. & E. 773.

(*y*) *Re Dixon*, (1892) P. 386.

(*z*) *Nistarini v. Nandalal*, 30 Cal. 369.

(*a*) *Hancock v. Podmore*, 1 B. & Ad. 260.

(*b*) *Camini v. Administrator-General of Madras*, 20 Mad. 290.

(*c*) 1 Knapp. 245.

(*d*) *Brice v. Wilson*, 8 A. & E. 349.

(*e*) *Lucy v. Walrona*, 3 Bing. N. C. 841.

(*f*) *Tugwell v. Heyman*, 3 Campb. 298.

(*g*) *Nand Rami v. Krishna*, 37 All. 997.

said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

[This is sec. 277 of the Succession Act X of 1865 and sec. 98 of the Probate and Administration Act V of 1881.]

Sub-section (1).

Inventory and Accounts.—By this section a statutory obligation is placed upon the executors and administrators to exhibit in Court an inventory of all the property moveable and immoveable and of all credits and debts due to the estate of the deceased within six months from the date of grant without any proceedings calling upon them to do so. The present practice, however, is for the legal representatives to exhibit an inventory only when he is lawfully required to do. After he is lawfully so required he wilfully and without reasonable cause omits to file an inventory it is a just cause for the revocation of the grant, [sec. 263 (e)].

Any interest in the estate of the testator or intestate is sufficient to support an application for inventory. An executor who does not join in the application for probate but whose rights are reserved has an interest to call upon the other executor to file an inventory and account(h).

Although this section requires an inventory to be filed within six months from the date of grant, lapse of time is no bar to the right to require an executor to file an inventory but the Court has a discretion to refuse the application if it is frivolous or vexatious(i). The inventory is to be filed with the Testamentary Registrar in the High Courts and with the District Judge in the mofusils.

Contents of inventory.—The inventory must contain a full and true estimate of:—

- (a) All the property, both moveable and immoveable, in the possession of the executor or administrator, and, when the grant is made having effect throughout the whole of British India, all the moveable and immoveable property in British India and the value of such property situate in each province, (sec. 318), and must include not only all the property which the deceased died possessed of but also the subsequent rents and interest and income of such properties and the profits of his business (if any).
- (b) All the credits of the deceased, and
- (c) All the debts owing by any person to which the executor or administrator is entitled in that character. A mere list of the property of the deceased is not an inventory(j).

(h) *Jehanji v. Kulkarni*, 27 Bom. 281.
 (i) *See Jetha Padamsi*, 7 Bom. L. R. 451;
Moolji v. Moolla, 35 I. C. 930.

(j) *Bhubaneswari v. Collector of Gaya*, 41 Cal. 556, 40 I. A. 236.

It is the Probate Court which granted the probate or letters of administration that has jurisdiction to demand an inventory and account. The Court can only require that the property which the deceased died possessed of should be included in the inventory; it cannot call for an account of the subsequent profits of his business(k), (Williams on Executors, 12th Edn., p. 567).

Account.—Sub-sec. (I) does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory and account. It merely imposes a duty on the executor or administrator to do so. If he does not do so the Court may require him to do so(l). A statutory obligation is also placed on the legal representatives to exhibit, within one year from the date of grant, an account of the estate showing the assets come to his hands and of the disbursements thereof. The account must show the assets come to his hands and the manner in which they have been applied. The word “assets” means things available for distribution and includes goods, chattels, etc., of which the deceased was in possession at the time of his death or which have come to the hands of the executor or administrator. As regards goods and chattels *in action* or *in possibility* they are not considered assets until recovered; debts due to the deceased are not assets(m). In practice, however, neither an executor nor an administrator files any account, until he has been cited to do so by any person interested in the estate. But when once he is called upon to file his account it is his duty to do so without compelling the party calling upon him to take out an order to compel him to do so(n).

The word “an account” means that the inventory and account required to be filed under this section is only one inventory and one account and not periodically every year and they are final so far as the proceedings on the testamentary sides are concerned. The words “from time to time” which occurred in sec. 277 of the Act of 1865 have been omitted.

According to sub-sec. (I) inventory must be filed within six months and the accounts within one year. If an account is not filed within one year from the grant of probate and the executor did not obtain from the Court an extension of time, the Probate Court has jurisdiction to direct him to file an account of the estate. In such a case the account must relate to the whole period *i.e.* from the date of the grant to the date of the filing of the account(o).

This practice of requiring the executor or administrator to file one complete account has the effect of holding up the security to the bond for an indefinite length of time and Bhagwati J., of the Bombay High Court has relaxed the practice and has directed the Prothonotary to accept the account brought upto a date specified in the order and to take the same on file and directed the executor to file his further accounts in due course thereafter. (See Bombay Law Journal, 1945 pp. 466-468.)

The accounts are not to be passed before the commissioner for taking accounts(p). Under this section the Court has no power to institute an inquiry as to whether the inventory and account filed are correct. All that the Court has to do is to see that the inventory and account *prima facie* satisfy the requirements of the section. If the account is *prima facie* proper no order can be made to bring in a revised account. But if the account is materially untrue the Judge may take action

(k) *Pitt v. Woodham*, (1928) 1 Hag. Ecc. 247.

(l) *Moolla Cassim v. Moolla Abdul*, 9 Bur. L. T. 148; 85 L. C. 950.

(m) *Khushrobbhai v. Hormazsha*, 11 Bom. 727; see also, *Omrifa Nath v. Adm.-General*, 25 Cal. 54 at 58; *In re Courjon*, 25 Cal. 65 at 73; *Watkins v. Sarat Chandra*, 31 Cal. 372 at 382; *Ganoda Sundary v. Nalini*

Ranjan, 36 Cal. 28.

(n) *In re Jetha Padamsi*, 7 Bom. L.R. 451.

(o) *Hiralal v. Jiban Kunwar*, 43 C. W. N. 754.

(p) *Chandra v. Prasanna*, 48 Cal. 1051; *Mohesh Chandra v. Biswa Nath*, 25 Cal. 250.

under sub-sec. (4)(g). But in order to discharge the surety to the administration bond, the Probate Court has power to have the accounts scrutinized by the Commissioner for taking accounts. The Court has even power to scrutinize the accounts *suo motu* particularly when it is moved under sections 301 or 302 in order to see whether the executor has so misconducted as to make it necessary to remove him(r). The remedy of the party aggrieved by the accounts so filed is to file an administration suit; the filing of accounts under this section is not a bar to a suit for accounts against the legal representatives(s).

Sub-section (2).

Form of Inventory and Account.—No form has been prescribed by the Bombay High Court. In the absence of any prescribed form and in the absence of any rule, the section is the only guide. In the inventory should be set out all the assets realized. In the account the executor or administrator should show the assets which have come to his hands and the manner in which they have been applied or disposed of. The section lays down that there should be as usual, two sides of the account a credit side and a debit side. Credit side will be the assets come to the hands of the executor or administrator, and the debit side will show the manner in which these assets have been applied or disposed of and they must be complete and final.

Sub-section (3).

If an inventory and account filed by the legal representative are intentionally false, he renders himself punishable under the Penal Code(t). The obligation under this section is to exhibit inventory and account and not to produce the assets in the hands of the legal representatives in Court. The Court has no jurisdiction to make such an order and the disobedience of the same does not render the legal representative liable to prosecution under this section(u). For the purposes of this section, the Court has no power to institute a judicial inquiry to have the account audited. If the inventory and account are in proper form and *prima facie* accurate the same may be filed. The remedy of the party not satisfied with the accounts is not under this section but by a suit for accounts(v).

Sub-section (4).

For exhibiting false inventory prosecution may be sanctioned and the executor may be removed(w).

Practice and Procedure regarding the Inventory and Accounts and Discharge of Surety

Whether it is necessary to have the accounts passed before the Commissioner :—In *Morarji Kanji v. Bai Panbai*(x), Mirza J. after going into the English practice held that the accounts as required by this section to be filed by the executors or administrators cannot be passed as such by the Testamentary Registrar. If these accounts are challenged then the remedy of the beneficiaries is to ask for the revocation of the grant under sec. 263(e) if the accounts are wilfully and without reasonable cause not exhibited by the person to whom the grant was made, or to file an administration suit. His Lordship observed that the practice of the Court was to require an inventory and account to be filed with the testa-

(g) *Sarat Sundari v. Uma Prasad*, 31 Cal. 628; *Morarji v. Panbai*, 20 Bom. L. R. 683.

(r) *Gulati v. Reeves Brown*, A. I. R. (1939) L. 463.

(s) *Balakbala v. Jadunath*, 57 Cal. 1358.

(f) *Morarji v. Panabai*, 29 Bom. L. R. 863.

(u) *Khetu Mohan v. Suromini*, 12 C. L. J. 602.

(v) *Balakbala v. Jadunath*, 57 Cal. 1358.

(w) *Gulati v. Reeves Brown*, A. I. R. (1939) L. 463.

(x) 29 Bom. L. R. 683; A. I. R. (1927) B. 438.

mentary registrar and the executor or administrator was not required to pass his inventory and account before the Commissioner for taking accounts. The same question came up for reconsideration in the office of the Bombay High Court in the matter of Thakoredas B. Banatwalla deceased and Dinsha D. Nasikwalla, deceased. The present practice adopted by the Bombay High Court is as follows. If the accounts are required to be passed for the purpose of discharging the surety then the following procedure is required to be adopted.

1. Inventory and accounts must be filed in the office of the Prothonotary.
2. Petitioner must make his affidavit in support of a Chamber Order and obtain an order from the Chamber Judge to refer the matter to the Commissioner for taking accounts in the following form :

“Upon reading the inventory and account of the abovenamed relating to the administration of the estate of the abovenamed deceased and Upon reading the affidavit of the said sworn on the day of 194 . And Upon hearing Messrs. Attorneys for the said administrator it is Ordered that the said Inventory and Account be referred to the Commissioner of this Hon'ble Court for Taking Accounts AND IT IS FURTHER ORDERED that the Commissioner do examine the same and certify to this Court whether the said Inventory and Account represent a true, complete and just account of the administration of the estate of the abovenamed deceased AND IT IS FURTHER ORDERED that upon receipt by the Prothonotary and Senior Master of the said certificate the recognizances entered into by the Administrator and his sureties under the Administration Bond be vacated and that the Prothonotary and Senior Master do thereupon endorse upon the said Bond a Memorandum to that effect and IT IS LASTLY ORDERED that this Order be filed on or before the day of 1942.

Dated this day of 194 .

Prothonotary and Senior Master.

Administrator's Attorneys.

3. After the order is made, a certified copy of the said order and a certified copy of the inventory and account should be filed in the office of the Commissioner for Taking Accounts and thereafter the Commissioner issues notices or warrants to be served on the parties interested in the accounts; and after the warrants are served a meeting is held in the office of the Commissioner.
4. At the hearing before the Commissioner vouchers in support of the said accounts must be produced before the Commissioner to enable him to pass the accounts.
5. After the accounts are passed an affidavit of the petitioner must be filed for verification of the accounts.
6. Commissioner will then issue his certificate. The certificate must be filed in the Prothonotary's office and after this is done a precept should be written for discharge of the Bond. Thereupon the Prothonotary will make an endorsement on the Bond that the surety is discharged.

318. In all cases where a grant has been made of probate or letters of administration intended to have effect throughout the whole of British India, the executor or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India, and the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

[This is sec. 277. 1 of Succession Act X of 1865 and sec. 99 of the Probate and Administration Act. V of 1881.]

In the case of a grant throughout the whole of British India in addition to the requirements in sec. 317 the inventory must show separately the property situate in each province and the approximate value of such property. The probate duty will be assessed for the whole property according to the scale of the province in which the Court is situate and not according to different scales prevailing in the provinces where the properties are(y).

319. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

As to property of, and debts owing to, deceased.

[This is sec. 278 of the Succession Act X of 1865 and sec. 100 of the Probate and Administration Act V of 1881.]

Getting in the Property.—It is the duty of the legal representatives to collect and get in the property of the deceased with due diligence. The executor is entitled to recover all the property belonging to the testator. In the case of property standing in the joint names of the testator and another as the rule of advancement is not recognised, the executor is entitled to recover such property also(z). The general rule is that a year is reasonable, (see sec. 337) within which he should realize all unauthorized or hazardous investments of the testator; but when the legal representatives acting in the honest exercise of their discretion postpone the sale and conversion beyond the year, they will not be liable for devastation(a). A direction in the will that the executors should sell with all convenient speed does not render it obligatory upon them to sell at any particular time, they are still entitled to exercise a reasonable discretion(b). Executors are not liable for mere errors of judgment if they act honestly and with ordinary prudence.

In case where the residue is given for life with remainders over, it is the duty of the executor in the absence of special provision to see that the fund is properly invested, (sec. 345).

In the case of leasehold properties for long term in India the rule laid down in *Howe v. Earl of Dartmouth*(c) still applies and the legal representative has no right to retain the leasehold property, (see p. 318, ante). In England the law is changed

(y) *In re G. T. Williams*, 50 Cal. 597.

Ch. 763.

(z) *Exory v. The Belfast Banking Co.*, (1935) A. C. 24.

(b) *Grayburn v. Clarkson*, (1868) 3 Ch. App. 803.

(a) *Buxton v. Buxton*, (1835) 1 My. & Cr. 80; *Re Chapman*, *Cocks v. Chapman*, (1896) 2

(c) (1802) 7 Ves. 137.

from 1st January 1926 when the Law of Property Act, 1925 (15 Geo. V, c. 20) came into force(d).

Where any particular securities are indicated by the testator the executors will not be justified in going beyond such mode of investment from any belief well founded or otherwise of thereby benefitting the *cestui que trustent*. In the absence of any power expressly given by the will, it is the general duty of an executor to invest in the authorized securities. But if the will provides that the legatee should enjoy the residue *in specie* so as to exempt the executors from their duty of conversion the executors shall not be liable(e).

Collecting Debts.—It is the duty of the legal representatives to get in as speedily as possible all moneys of the deceased remaining outstanding. If by unduly delaying to file a suit the executor or administrator enables the debtor of the deceased to avail himself of the benefit of the Limitation Act, the executor or administrator will be personally liable, (ill. *ii.* sec. 369).

If the executor is himself the debtor, the debt due from him is considered as an asset in his hands(f). No limitation runs as long as he remains executor or dies whichever first happens(g).

In the case of mortgage on immoveable property there is no duty upon the legal representatives to realize the mortgage created by the deceased himself where the realization is not required for administrative purposes, and the security is not in any peril(h). When the security falls in value below the two-thirds limit laid down by sec. 20 of the Indian Trusts Act, it is not the absolute duty of the executors or administrators at once to call in the mortgage but they have a discretion, which they must exercise as practical men, with due regard to all the circumstances of the case(i).

Investment of Cash.—In *In re Wragg, Wragg v. Palmer*(j) the testator by his will authorized his executor to invest any moneys forming part of the trust estate in or upon stocks, funds, shares securities or other investments of whatever nature as the trustees should in their absolute and uncontrolled discretion think fit: it was held that word "investment" should not be interpreted in a restricted sense and it included investment in real property. In *In re Sudlow, Smith v. Sudlow*(k) the words used in the will were "any moneys liable to be invested under this my will may remain invested as at my death" and the question was whether a sum of £2900 on deposit with the firm of wholesale druggists in whose employment the testator had been and which produced five per cent. interest was money invested and it was held that the testator used the word "invested" in its primary and true meaning and the money deposited with the firm was not money "invested" at the time of the death of the testator. In *In re Price, Price v. Newton*(l), the expression used was "pecuniary investment" and it was held that this expression did not include deposits with his banker by the testator at a short call. But in *In re Lewis Will Trusts, O'Sullivan v. Robbins*(m) it was held that money on deposit may be an investment. In the absence of any direction in the will for investment of cash, a legal representative incurs no liability by leaving cash with a bank, but he must keep it in a separate account and not mix it with his own money(n).

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| (d) <i>In re Berton, Vandyk v. Berton</i> , (1938) W. N. p. 354. | (h) <i>Re Chapman, Cocks v. Chapman</i> , (1898) 2 Ch. 763. |
| (e) <i>M. A. De Soosa v. Ignacio</i> , 12 B. H. C. R. 184 at 189. | (i) <i>Re Medland, Eland v. Medland</i> , 41 Ch. D. 476. |
| (f) <i>Administrator-General v. Kristo</i> , 31 Cal. 319. | (j) (1919) 2 Ch. 58. |
| (g) <i>Yakub v. Bai Rahumabai</i> , 10 Bom. L. R. 346.; <i>Hossainara v. Rahimannessa</i> , 38 Cal. 342. | (k) (1914) W. N. 421. |
| | (l) (1905) 2 Ch. 55. |
| | (m) (1937) 1 Ch. 118. |
| | (n) <i>Johnson v. Newton</i> , 11 Hare. 160. |

is entrusted to those who have the strongest interest to conduct it cheaply and expeditiously(a). If the estate is not deficient the creditor gets his costs only on the party and party scale, (Halsbury, Vol. 14, p. 352, and Hailsham Edn., Vol. 14, p. 460). But if the estate is insufficient to pay all the debts, a legal representative is not entitled to claim costs out of the estate because there is no fund out of which he may be reimbursed, (Williams on Executors, 12th Edn., p. 1306). In order to claim costs out of the estate the plaintiff must satisfy the Court that the legal representative was not administering the estate properly and the intervention of the Court was necessary for safeguarding the plaintiff's rights(b). In the case of an administration suit by a creditor on behalf of himself and other creditors it is undesirable that individual creditors should be added as parties unless some very strong reason is shown viz. that the person who has filed the suit on their behalf is not conducting it properly(c).

Charging Order for costs incurred by Executor when made.—In an administration suit filed by a creditor of the deceased, a charging order in favour of the solicitor for the defendant executor on the fund in Court for their costs of the administration suit not only in respect of the property recovered by his exertions but in respect of the whole suit will be made limited to the costs properly incurred by the solicitor in recovering and preserving the property(d). (See Williams on Executor's 12th Edn., p. 687.)

322. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

Wages for certain services to be next paid, and then other debts.

[This is sec. 281 of the Succession Act X of 1865 with the addition of the words "according to their respective priorities" at the end of the section. It is in accordance with sec. 103 of the Probate and Administration Act V of 1881.]

Domestic Servant.—The words are not confined to the servants who actually work in the house but include other servants who would ordinarily belong to an Indian household, such as coachmen, syces, malis and bearers(e); but not a tailor(f), (see also Williams on Executors, 12th Edn., p. 738).

The rule laid down in this section is analogous to sec. 49 of the Presidency Towns Insolvency Act where also salary and wages of clerks, servants or labourers for services rendered during four months before insolvency have priority. Under this section the salary of a clerk is not mentioned.

"According to their respective Properties (if any)."—These words were not in the Act of 1865. They were inserted to protect a decree-holder(g). A judgment debt takes priority over other debts (see the heading under "Judgment Debt" at p. 549). But a creditor of the deceased who has obtained attachment on the property of the judgment debtor's property prior to the preliminary decree in an administration suit is not entitled to priority over other creditors(h).

Crown Debts.—The Crown is not bound by secs. 322-323 and the prerogative of the Crown for preferential payment is not taken away by implication(i).

(a) *Ahmed v. Mahomed*, 10 Bom. L. R. 1166.

(b) *Ismail v. Haji Ibrahim*, 59 Bom. 397=37 Bom. L. R. 57.

(c) *Vassanji v. Esmailbhai*, 11 Bom. L. R. 1054.

(d) *In re Webster Wemyss*, (1940) 1 Ch. 1 at pp. 4-5 & pp. 18-15.

(e) *Banno v. Upendra*, 8 B. L. R. 244.

(f) *Vithoba v. Corfield*, 3 B. H. C. R. App. 21

(g) *Nilkomal v. Reed*, 17 W. R. 513.

(h) *Gourgopal v. Kamal Kalika*, 61 Cal 240.

(i) *U. Ba Thi v. Adm. General*, (1939) Rang. 701; A. I. R. (1940) R. 36; *Governor General in Council v. Chotalal*, I. T. R. 411.

323. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

[This is sec. 282 of the Succession Act X of 1865 with the omission of the words "by reason that his debt is secured by an instrument under seal or on any other account." It is in accordance with sec. 104 of the Probate and Administration Act V of 1881.]

"Save as aforesaid."

Order of Payment.—These words imply the priority of payment created by sections 320, 321, 322. The application of the estate by the legal representatives is in the following order :—

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| To be paid first. | { | (a) Funeral expenses to a reasonable amount according to the degree and quality of the deceased. |
| | | (b) Death-bed charges including medical attendance. |
| | | (c) Board and lodging for one month previous to death. |
| Then | | (d) Executorship expenses, <i>i.e.</i> , expenses of obtaining probate or letters of administration including costs of any suit or proceedings for that purpose. |
| Then | | (e) Wages of labourers, artisans, and domestic servants of the deceased for <i>three months</i> immediately preceding the death. |
| Then | | (f) All other debts of the deceased including the debt due to legal representatives. |
| Then | | (g) The legacies and annuities. The order of payment of legacies is given in sections 327 and 330. |

Payment of Debts.—There is no rule of law that it is the duty of executors to pay the debts of the testator within a year of his death. Apart from any provisions contained in the will which expressly or impliedly deal with the payment of debts, it is the duty of executors as a matter of due administration of the estate, to pay the debts of the testator with due diligence, having regard to the assets in their hands which are properly applicable for the purpose. In determining whether due diligence has been shown regard must be had to all the circumstances of the case. Due diligence may require that payment be made before the expiration of the year, but the circumstances affecting the estate and the assets comprised in it may justify non-payment within the year. If, however, the debts are not paid within the year, the onus is thrown on the executors to justify the delay(j).

As against the creditors, the provisions of the testator's will which relate to the realization of his assets or otherwise bear on the payment of debts are irrelevant. As against the beneficiaries, the position is different. The beneficiaries take their interest under the will only on the terms of the will, and, as respects them full effect has to be given to any provisions which either in express terms or by implied terms, modify the executors duty to pay debts with due diligence.

Debts may be divided into two classes—ordinary debts and judgment debts. As regards ordinary debts this section lays down that no creditor shall have any priority and if the assets are insufficient to pay all the debts of the deceased in full then the legal representative must apply such assets in payment of all debts as he knows of equally and rateably. Rateable payment means rateable payment out

(j) *In re Tankard, Tankard v. Midland Bank*, (1942) 1 Ch. 69.

of the whole assets and not only out of the income(k). If a legal representative pays such debts as he knows of otherwise than equally and rateably he is personally liable to the creditor for improper distribution of the estate(l).

If the estate is not sufficient to pay all the creditors in full, it is not open to the legal representatives to mortgage the estate in favour of one creditor for making payment in excess of rateable distribution. If such a mortgage is effected it is open to the remaining creditors to sue for a declaration that neither the mortgage nor the decree obtained by the mortgagee is binding on them(m).

A direction in a will to the executors to pay all the debts of the testator does not create a charge on the estate(n).

“As he knows of.”

Rateable distribution under this section is to be made only among creditors of whose existence the executor is aware of. His liability to distribute the assets *pari passu* is limited to the debts which he throws of(o).

This section imposes liability for proper distribution of the estate on the legal representatives in respect of debts of which he has actual notice. The knowledge must be actual and not constructive to make him personally liable(p). In order to enable the executor to ascertain the entire liability due by the estate, the executor or administrator should give notice as provided in sec. 360 and if after giving such notice he distributes the estate in payment of debts of which claims are received by him, then he will be protected and the creditors who come in afterwards have their remedy to follow the assets in the hands of the legatees under sec. 361, they cannot disturb the distribution made to the creditors. In the case of a creditor whose claim is disputed by the legal representative the creditor's remedy is to establish the same against the legal representative in Court and pending such suit the executor or administrator should not distribute the estate or make some provision for its payment in the event of the claim being established.

In a suit by a creditor if the demand is not contested and the executor admits assets, the creditor is entitled to an order for immediate payment without account(q).

Where there is no disputed fact the administrator can by an originating summons claim an account from a debtor to the estate(r).

In an administration suit where the assets are insufficient to pay all the creditors in full and the assets are distributed *pro rata* amongst those creditors who have proved their claim, a creditor who has not so proved and has not received payment is not subsequently entitled to file a suit against the other creditors who have received payment for a *pro rata* refund(s). The English practice is also to the same effect. An unpaid creditor who has not proved his claim in an administration action can only get payment of his debt not by way of action but by way of petition under the administration suit; such a petition will succeed if the funds are still under the control of the Court. If they are not the claim will only succeed against satisfied legatees but not against the creditors who have received payment of their debts, (sec. 361).

As regards contingent liabilities the legal representative is not entitled as against the general body of creditors to make provision for such contingent claims; such liabilities do not constitute a debt until the contingency arises, (see sec. 326).

(k) *Omruta v. Adm.-General*, 25 Cal. 54.

(l) *Asiatic Banking Corporation v. Amador Viegas*, 8 B. H. C. R. 20.

(m) *Matheradas v. Raimal*, 37 Bom. L. R. 642.

(n) *Ambica v. Multa*, 2 C. L. J. 138.

(o) *Kissondas v. Jivallal*, 88 Bom. L. R. 864.

(p) *Asiatic Banking Corporation v. Amador Viegas*, 8 B. H. C. R. 20 (o. c. j.)

(q) *Omruta v. Administrator-General*, 25 Cal. 54.

(r) *Clotilda v. John*, 62 Cal. 120.

(s) *Kissondas v. Jivallal*, 88 Bom. L. R. 864.

A contingent creditor is not entitled to obtain an order for the administration of the estate(t).

Debts barred by Limitation.—An executor or an administrator may pay a debt barred by limitation(u). In *Administrator-General v. Hawkins*(v), it was held that the Administrator-General may pay a barred debt unless the debt is judicially declared to be barred(w). The inclusion of a debt in the schedule to the petition for probate is not an acknowledgment within the Limitation Act(x).

The institution of a suit by a creditor for himself and for other creditors for the administration of the estate of the deceased will not save limitation in favour of an individual creditor who is not a party to the suit, but an order for the administration of the estate will prevent time from running against all creditors coming in under the order(y). A creditor's suit for administration is not a representative suit until a preliminary decree is passed, and does not stop limitation from running against the creditors of the estate. But after the administration order every creditor has an interest in the suit and is deemed to be before the Court(z). A creditor's suit against the estate should be treated as an administration suit and the Court should give a declaration of the debt due to be satisfied in due course of administration(a).

The inclusion of a debt by the legal representative either in the inventory or in the account filed under sec. 317 is a sufficient acknowledgment within the meaning of sec. 19 of the Limitation Act(b).

Judgment Debt.—This section merely lays down a rule of procedure to be followed by an executor or administrator. It is not applicable to a judgment creditor(c). Sec. 50 of the Code of Civil Procedure provides that where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to execute the same against the legal representatives of the deceased who shall be liable only to the extent of the property come to his hands. Accordingly the legal representative has been held to be bound to pay to the decree-holder the full amo unt of the decree though there may be other creditors of the deceased and the assets may not be sufficient to pay them all in full(d).

Including his (Executor's or Administrator's) own Debt.

Executor's Right of Retainer.—Under this section the executor has no right to retain his own debt in preference to the debt of other creditors. The words "including his own" used in this section indicate that he has no right of retainer. He must pay all the debts *including his own* equally and rateably. But it would appear that if the assets are sufficient to pay all the debts in full, an executor may retain his own debt even though it be barred by limitation(e). The right of retainer does not give a charge on the property not in the possession of the executor(f).

English law :—In England as one of the privileges of an executor it has been recognised for a long time that he has a right to retain assets in payment of his own

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| <p>(t) <i>Re Hargreaves, Dicks v. Hare</i>, (1890) 41 Ch. D. 236.</p> <p>(u) <i>Pestonji v. Meherbai</i>, 30 Bom. L. R. 1407.</p> <p>(v) 1 Mad. 267.</p> <p>(w) <i>Midgley v. Midgley</i>, (1898) 3 Ch. 282.</p> <p>(x) <i>Beavan Re</i>, (1912) 1 Ch. 196.</p> <p>(y) <i>Kissondas v. Jivatlal</i>, 38 Bom. L. R. 864.</p> <p>(z) <i>Shashi Bhusan v. Manindra</i>, 44 Cal. 890; <i>Ramaswami v. Rangaswami</i>, 55 Mad. 26 at 33.</p> <p>(a) <i>Mathuradas v. Raimal</i>, 37 Bom. L. R. 642.</p> <p>(b) <i>Read v. Price</i>, (1909) 1 K. B. 577.</p> | <p>(c) <i>Kissondas v. Jivatlal</i>, 38 Bom. L. R. 864; A. I. R. (1936) B. 423.</p> <p>(d) See <i>Khushrobbai v. Hormazsha</i>, 17 Bom. 687 and other cases cited in Mulla's Code of Civil Procedure, 11th Edn., P. 212; see also <i>Nilkormul v. Reed</i>, 12 B. L. R. 287; <i>Meherbai v. Magan Chand</i>, 29 Bom. 96; <i>Remfry v. De Penning</i>, 10 Cal. 929.</p> <p>(e) <i>Mohesh Lal v. Busunt Kumarie</i>, 6 Cal. 340; see also <i>Peary Mohun v. Narendra</i>, 37 Cal. 229 (P.C.).</p> <p>(f) <i>Chidambra v. Krishnasami</i> 39, Mad. 365 at 369.</p> |
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debts due to him from the deceased in preference to all other creditors of equal degree. The foundation of this right to retain was the inability of the legal representative to sue himself, (Williams on Executors, 12th Edn., pp. 637 and 648, *et seq.*). This right was enlarged in his favour by Hinde Palmer's Act (32 and 33 Vict., c. 45) of 1869 under which all specialty and special contract debts of deceased persons are to stand in equal degree after January 1st, 1870.

The effect of this Act as decided in *In re Harris*(g) and *In re Samson*(h) has been to enlarge an executor's right of retainer in respect of a simple contract debt by enlarging the class of debts with which that debt competes and over which it may accordingly be given a preference namely a specialty debt.

Prior to the enactment of the Administration of Estates Act, 1925, the right of retainer was limited and extended only over legal as distinguished from equitable assets, and his right was not restricted to a debt due to him personally which he claimed beneficially but also extended to those to which he was entitled as trustee.

The Administration of Estates Act, 1925 (15 Geo., 5 c. 23) by sec. 34, sub-sec. (2) has extended the right of retainer to all the assets of the deceased both legal and equitable and has thereby conferred an advantage. But a disadvantage has been imposed by the words "but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with other person." This took away from him the right of retainer in respect of debts which is owing to the executor as a trustee(i). Sec. 34 classified the debts unto (1) preferential debts (2) ordinary debts and (3) deferred debts. In England the right of retainer has priority over the costs of an administration action, even though the amount is brought into Court(j). In *In re Cockell*(k) the deceased appointed a lady to be his sole executrix. His estate turned out to be insolvent and a debt was owing to the executrix. There was a preferential claim for arrears of income tax and super tax. The executrix claimed a right of retainer. It was held that as the debts for which the right of retainer was claimed was an ordinary debt while the Crown's was a preferential one and the right of retainer could not prevail over the Crown's debt(l). Subject to these two changes, one enlarging and one restricting, the right of retainer remains. (see also Halsbury, Vol. 14, p. 256 and Hailsham Edn., Vol. 14, p. 332).

Equally and Rateably.—The equal and rateable payment is to be made out of the corpus of the estate and not out of the income(m).

Application of
moveable property
to payment of
debts where domi-
cile not in British
India.

324. (1) . If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of British India.

(2) No creditor who has received payment of a part of his debt by virtue of sub-section (1) shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(g) (1914) 2 Ch. 395.

(h) (1906) 2 Ch. 584.

(i) *In re Buda*, (1942) W. N. 160.

(j) *In re Webster*, (1940) 1 Ch. 1 at pp. 13-15.

(k) (1932) 16 T. C. 68.

(l) (1931) 1 Ch. 398 (in appeal *Attorney-General v. Jackson*, (1932) A. C. 365.)

(m) *Amrita v. Adm.-General*, 25 Cal. 54.

(3) This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.

[*Clause (1) is sec. 283 of the Succession Act X of 1865; Clause (2) is sec. 284 of the Succession Act X of 1865; Clause (3) is new.*]

Sub-section (1).

By sec. 5(2) in the case of a foreigner, the succession to the moveable property left by him is regulated by the law of domicile. This sub-sec. is a counterpart to that section and provides that although succession to the moveable property of a foreigner is governed by the law of domicile, the application of such moveable property in British India for the payment of that person's debts in British India is to be regulated by the provisions of this Act, *i.e.*, there will be no priority but all the creditors must be paid equally and rateably. A creditor of whatever nationality is only entitled in the administration of moveable assets in this country to be paid equally with the Indian creditors(n).

Sub-section (2).

This sub-section lays down the mode of equitable distribution as shown in the illustration. The rule laid down in this sub-section is analogous to the equitable doctrine of marshalling of assets. The Courts distributing the Indian assets will be astute to equalize the payments and take care that no foreign creditor shall receive anything until the Indian creditors had been paid out of the immoveable property an amount proportionate to the amount received by the foreign creditors out of the moveable assets under sub-sec. (1) (o).

Sub-section (3).

This sub-sec. re-enacts the provision of the Probate and Administration Act, 1881. There was no such provision in that Act corresponding to sec. 283 of the Act of 1865 and therefore sec. 283 did not apply to Hindus, Mahomedans, Buddhists, Sikhs, Jains or exempted persons.

Debts to be paid before legacies. **325. Debts of every description must be paid before any legacy.**

[*This is sec. 285 of the Succession Act X of 1865 and sec. 105 of the Probate and Administration Act V of 1881.*]

This section lays down the rule of distribution that no legatee is entitled to be paid anything until all the debts left by the deceased are discharged. Debts of every description must be paid, *viz.*, ordinary debts, bond debts, judgment debts and mortgage debts. If there are contingent liabilities, the legal representative is not entitled as against creditors to make provision for the payment of such liabilities; such liabilities do not constitute a debt until the contingency occurs(p).

(n) *Eames v. Haron*, (1881) 18 Ch. D. 347.
(o) *Re Kloebe*, (1884) 28 Ch. D. 175.

(p) *Re Hargreaves, Dicks v. Hare*, (1890) 44 Ch. D. 236.

It is only when all the debts presently due are paid, that the legal representative is entitled to make provision for payment of contingent liabilities under sec. 326 before paying legacies.

This section does not mean that it is the duty of the executor or administrator in every case whether the estate is solvent or insolvent to pay each creditor before making payment of the legacies. It only lays down priority of payment of debts before payment of legacies. In an admittedly solvent estate, it does not stand in the way of the executor paying a legatee before he has discharged the debts of the deceased(*q*).

Even if the executor is himself a residuary legatee, he cannot take any money out of the estate, without making provision for the debts and specific legacies. If the executor who is the residuary legatee takes the money for himself before paying debts and legacies, it is a breach of trust on his part(*r*). But there is no breach of trust if an administrator pays money to a third person with the full knowledge of all facts and with the consent of all the next-of-kin, although such a consent was given under a mistake as to their legal rights(*s*).

326. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

Executor or administrator not bound to pay legacies without indemnity.

[This is sec. 236 of the Succession Act X of 1865 and sec. 106 of the Probate and Administration Act V of 1881.]

After the payment of all debts the next in order of payment is the payment of legacies. This section provides that before making any payment of legacies the executor or administrator must see whether there are any contingent liabilities; if there are it is the duty of the legal representative to make arrangement for such payment whenever they may become due. If the legal representative distributes the estate amongst the beneficiaries without regard to contingent liabilities, he will do so at his peril.

A legatee cannot legally claim his legacy from the executor when any debt remains unpaid; but when there is no present debt but a contingent liability only, the present practice of the Court is not to retain funds in Court for the payment to a future contingent creditor, but to distribute the estate on taking sufficient indemnity from the beneficiaries; such liabilities do not constitute a debt until the contingency has arisen, (Halsbury, Vol. 14, p. 330).

Shares in Joint Stock Companies.—If the deceased is a member of a joint stock company his estate remains subject to the burdens of the membership and his legal representatives are liable for the payment of all calls. If the call is not presently due but is a contingent liability and the legal representative distributes the estate without providing for the liability attaching to the estate in respect of shares not fully paid up, he is guilty of *devastavit* and is personally liable to pay the amount of the call on the shares to the extent of the assets distributed(*t*). If the legal representative gets the shares transferred to his name, he becomes a member of the company and is subject to all the liabilities of a member. But the mere production and registration of the grant for the purpose of having it recorded in the company's books does not render him personally liable as a shareholder(*u*).

(*q*) *Gocerchandass v. Harish Chandra*, 38 C. W. N. 457; A. I. R. (1934) C. 609.

(*r*) *Gocerchandass v. Gopaladas*, 60 Cal. 30.

(*s*) *Ardesir v. Manchershaw*, 12 Bom. L. R.

58.

(*t*) *Taylor v. Taylor*, (1870) L. R. 10 Eq. 477.

(*u*) *Buchan's Case*, (1879) 4 App. Cas. 547.

If, therefore, the estate holds shares which are not fully paid up the legal representative ought not to distribute the estate amongst the beneficiaries without taking a sufficient indemnity from the beneficiaries or the sanction of the Court. If the Court has given the sanction for distribution it will be a complete indemnity to the legal representative(v).

Leases.—If the estate of the deceased consists of leaseholds, the position of the legal representative whether as executor or as administrator requires careful consideration, particularly as regards the liability under the covenants in the lease. If the deceased is the original lessee there is both a privity of contract and a privity of estate. In such a case if the original lessee assigns his lease, notwithstanding the assignment he still remains liable on the express covenant and his liability extends to the legal representatives. As between the assignee and the lessor, there is no privity of contract, since the assignee has not entered into any express covenant with the lessor but upon the assignment a privity of estate is constituted as between the assignee and the original lessor and the position is the same from assignee to assignee. By reason of the privity of estate the assignee will be liable to the original lessor for breaches of covenants running with the land *e.g.* to pay rent during the period that he is the assignee but not after the assignee has himself assigned to a third person.

It is usual however in the assignments for an assignor whether he is the original lessee or an assignee from the lessee, to require his assignee to enter into express covenant with the assignor of indemnity and on such covenant for indemnity an assignee will be liable for breaches committed even after the assignee has assigned the term.

If the legal representative is of the original lessee, there will be a privity of contract and a privity of estate of the original lessee, and he will be subject to a potential liability for breaches of covenants in his lease, notwithstanding that some third person happens to be the lessee by virtue of an assignment and the position is the same if the legal representative is of an assignee from original lessee who has entered into an express covenant of indemnity with the assignor. The liability will remain so long as the term continues. If, therefore, the legal representative were to distribute the assets, he might find himself at some future date faced with an unexpected claim for breach of covenant and if there were no assets left, he might have to make good the deficit out of his pocket.

In England protection is given to the personal representatives by sec. 26(1) of the Trustee, Act, 1925 [15 Geo. 5, c. 19 as amended by Law of Property Amendment Act, 1926 (16 & 17 Geo. 5, c. 11)] which enacts that "where a personal representative or trustee liable as such for (a) any rent covenant or agreement..... contained in any lease; or — (c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraph satisfies all liabilities under the lease.....which may have accrued, or been claimed, upto the date or the conveyance hereinafter mentioned and where necessary, *sets apart a sufficient fund to answer any future claim* that may be made in respect of any fixed and ascertained sum, which the lessee..... agreed to lay out on the property described.....the personal representative or trustee may convey the property demised.....to a purchaser, legatee or devisee and thereafter (i) he may distribute the residuary real and personal estate of the deceased testator.....(ii) notwithstanding such distribution he shall not be personally liable in respect of any *subsequent* claim under the said lease".

Accordingly where the deceased's estate consists of leaseholds, and the personal representative has not entered so as to constitute privity of estate as between the

lessor and himself and thus constitutes himself an assignee, the personal representative may safely sell or assent to the vesting of the leasehold in any legatee or devisee provided he meets all liabilities under the lease which have accrued upto the date of the conveyance or assent by him and provided he sets aside a sufficient sum to answer any future claim. But the position is different where the personal representative has actually entered into possession of the leasehold property and thereby caused privity of estate. In such circumstances according to *In re Omers, Public Trustee v. Death(w)*, sec. 26 of the Trustee Act, 1925, does not apply. The personal representatives are entitled to retain out of the estate a sufficient fund by way of indemnity against any liability that might arise under the covenants in the lease. Generally this fund should be such capital sum as would be sufficient to secure the annual rent and any future liability for dilapidation. This fund would be retained so long as there was any possibility of proceedings against the executors under the covenants in the lease, and the period would be the duration of the lease and a reasonable period thereafter. But where any possible action against the personal representative had become statute barred, the Court would order the fund so retained out of the estate to be distributed among the beneficiaries entitled thereto(x). In *In re Johnson(y)* the following order was made. "It is ordered that the plaintiffs as executors and trustees of the said will be at liberty to complete the administration of the estate.....without retaining any part thereof to meet any liability or possible liability of the testator's estate under or by virtue of clause 2 of the settlement."

In India there is no such statutory protection except as provided by this section. If the estate of the deceased consists of leaseholds, the executor is entitled to an indemnity from the residuary legatee before handing over the residue to him. If the executor has not entered into possession of the leasehold his liability is not personal but to the extent of the assets come to his hands. But if the executor has entered into possession he is liable not only to the extent of the assets which have come to his hands but he is personally liable for the payment of the rent(z).

327. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

[This is sec. 287 of the Succession Act X of 1865 with the addition of the words "in the absence of any direction to the contrary in the will." It is in accordance with sec. 107 of the Probate and Administration Act V of 1881.]

After the payment of debts, the legacies are to be paid and the order for payment of legacies is :—

- (a) Specific legacies.
- (b) Demonstrative legacies and,
- (c) General legacies.

Abatement of General Legacies :—If the estate is not sufficient to pay all the legacies in full the general legacies abate *pro rata* in the absence of a contrary direction by the testator.

(w) (1941) 1 Ch. 389.

(x) *In re Lewis Jennings v. Hensley*, (1939) 1 Ch. 232.

(y) (1940) W. N. 195.

(z) *Kameshwar Singh v. Pherozsha Merwanji*, 40 C. W. N. 390; 151 I. C. 121.

Section 331 shows that for the purpose of abatement a legacy for life and annuities are treated as general legacies and on deficiency of assets abate proportionately.

For the purpose of abatement of general legacies, a residuary legatee has no right to call upon the general legatees to abate. The whole of the residue must first be exhausted, before applying the rule of abatement under this section.

Legacy to Executor.—This section enacts that the executor has no right to retain any money on account of a legacy to himself or to any person for whom he is a trustee in priority to other general legatees. Legacies given to them cannot be claimed as compensation for their trouble in administering the estate and on the presumed intention of the testator to be given in priority. On the deficiency of assets, legacies given to the executor will fall within the rule applicable to abatement of general legacies. In *Heron v. Heron*(a) Lord Hardwicke expressed as follows :—"I am very unwilling to distinguish legacies given to executors for their care and pains from common legacies."

Contrary Intention.—Where a legacy is given in satisfaction of a debt it has been held in some cases that it expresses a contrary intention and is entitled to priority, but the matter is not free from doubt, (see Halsbury, Vol. 14, pp. 357-358). Also if by the express words or fair construction of the will, the intention of the testator is clearly manifest to give one general legatee a priority over the others that intention must be given effect to(b). But the direction that a particular legacy is to be given first and another legacy in the second place does not create priority if the assets are not sufficient to pay to all the legatees(c). Near relationship to the testator is not sufficient to give a legatee priority(d). A direction to pay a legacy immediately to the widow of the testator for her immediate wants is not sufficient to give priority(e). Even if the executor himself is one of the legatees he is not entitled to any priority.

The onus of proving that his legacy was intended by the testator to be paid in priority lies on the party, seeking priority(f).

Non-abatement of specific legacy when assets sufficient to pay debts.

328. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

[This is sec. 288 of the *Succession Act X* of 1865. and sec. 108 of the *Probate and Administration Act V* of 1881.]

Non-Abatement of Specific Legacies.—So long as the assets of the testator are sufficient to pay the debts and necessary expenses it is the duty of the executor to deliver the thing specifically bequeathed to the legatee without any abatement. Specific legacies do not abate with general legacies, but when the assets are insufficient to pay all the debts and the specific legacies, then the specific legatees must abate in proportion to their respective amounts, (sec. 330.)

329. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted and if, after the fund is exhausted,

(a) 2 Atk. 171.

(b) *Marsh v. Ivans*, 1 P. Wms. 668.

(c) *Ball v. Ball*, 27 Bom. L. R. 564; A. I. R. (1925) B. 337.

(d) *Blower v. Morret*, 2 Ves. Sen. 420.

(e) *Cazenove v. Cazenove*, 61 L. T. 115.

(f) *Lewin v. Lewin*, 2 Ves. Sen. 417.

part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

[This is sec. 289 of the Succession Act X of 1865, and sec. 109 of the Probate and Administration Act V of 1881.]

Abatement of Demonstrative Legacies.—Demonstrative legacies are not liable to abate with general legacies so long as the fund out of which they are directed to be paid is sufficient to pay such legacies. But when the fund is exhausted and the legacies become payable out of the general assets, such legacies are liable to abate with the general legacies on a deficiency of assets, (section 151), unless there is a direction to the contrary(g).

330. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Rateable abatement of specific legacies.

Illustration.

A has bequeathed to B a diamond ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

[This is sec. 125 of the Succession Act X of 1865, and sec. 110 of the Probate and Administration Act V of 1881.]

Abatement of Specific Legacies.—So long as the assets are sufficient a specific legacy is not subject to the rule of abatement, (sec. 328). It is only when the assets are not sufficient for payment of the debts and the executor is obliged to sell the thing specifically bequeathed to discharge the debts that the doctrine of abatement is applied to the specific legacy, and if there are several specific legacies they abate *pro rata*, (see illustration).

331. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated general legacies.

Legacies treated as general for purpose of abatement.

[This is sec. 291 of the Succession Act X of 1865, and sec. 111 of the Probate and Administration Act V of 1881.]

This section declares that a legacy for life and an annuity when no sum is appropriated to produce it are to be treated as general legacies for the purposes of abatement and do not have any priority over general legacies. On a deficiency of assets they abate with the general legacies. But the whole of the residue must first be exhausted, (see sec. 176).

In order to ascertain the values of annuities the following method is given in Halsbury, Vol. 14, p. 277 and Hailsham Edn., Vol. 14, pp. 358-359. If all the annuitants are living at the period of division, the value must be ascertained as at the death of the testator; if all be dead, the values must be taken to be the respective amounts of arrears; if some be dead and others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments.

(g) *Chinnam v. Tadikonda*, 29 Mad. 155; *Sahib Mirza v. Umda Khanam*, 19 Cal. 444.

This rule is to be applied only when annuity is not charged upon any assets of the deceased, *i.e.*, where no sum has been appropriated to produce it.

CHAPTER VIII.

Of Assent to a Legacy by Executor or Administrator.

Assent necessary
to complete lega-
tee's title.

332. The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Illustrations.

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

[This is sec. 292 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 112 and 148 of the Probate and Administration Act V of 1881.]

By whom Assent may be given.—The assent must be given by the executor or administrator. In sec. 292 of the Indian Succession Act, 1865 the word "administrator" did not occur. In sec. 148 of the Probate and Administration Act it was provided that in Chapters VIII, IX, X, and XII "the provisions as to an executor shall apply also to an administrator with the will annexed". Chapter VIII of the Probate and Administration Act contained sec. 112 which was that "the assent of the executor is necessary to complete a legatee's title to his legacy." The word "administrator" was not there; but by virtue of sec. 148 the assent of an administrator with the will annexed was incorporated. When the present Act was enacted the word "administrator" has been added, which would only mean an administrator with the will annexed. The reason why the assent is necessary is that the estate of the deceased is vested in the executor and this would apply to an administrator with the will annexed. Similar changes are made by the addition of the word "administrator" in secs. 333 to 337. The rule laid down in this section is for the executor's protection, because he is responsible to the creditors of the deceased. If there are several executors the assent by one of the executors is sufficient, [ill. (iv) sec. 311]. An executor may give assent before proving the will. When the executor himself is a legatee his assent to his own legacy is necessary, and his assent to his own legacy may be express or implied. If the executor in his manner of administering the estate does any act which is referable to his character of legatee and is not referable to his character of executor his assent shall be implied. If an executor legatee renounces probate, his assent to his own legacy will be ineffectual. In the case of a legacy to executors in trust for certain purposes their assent to it will make them trustees(h). It is also essential for an executor to prove the will or otherwise manifest his intention to act before he can claim the legacy(i).

Every legatee, whether general or specific and whether of moveable or of immoveable property, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. In the case of leasehold property it is not a breach of covenant against assignment without the consent of the lessor, if the executor assigns it to the devisee(j). The legatee, of course, has an inchoate right to the legacy before such assent and he can assign or transfer the legacy to any one he likes, (see illustrations to sec. 336) and in the event of his death before

(h) *Dix v. Burford*, 19 Beav. 409.

(i) *Prisono Coomar v. Adm.-General*, 15 Cal. 88.

(j) *Simon Christopher v. Alfred Christy*, A. I. R. (1939) P. C. 138.

the assent is given it is transmissible to his representatives(*k*). Where immovable property was left to the legatee and the legatee mortgaged it before obtaining the consent of the executor it was held that the mortgage is good(*l*), and the mortgagee is entitled to cut off the equity of redemption(*m*). But as a protection to the executor the law ordains that every legatee whether general or specific must obtain the executor's assent before his title can be complete and perfect. When once an assent is given it shall have relation back to the time of the testator's death, [see ill.(*i*) sec. 336]. Even if the will expressly direct that the legatee may take possession of his legacy without the assent of the executor, the legatee has no right to take possession of his legacy without the assent of the executor and if he does take possession, the executor may maintain an action for trespass(*n*). (Williams on executors 12th Edn., p. 894), but the Madras High Court has held that a legatee has a right to recover by suit against the legal representative the amount of his legacy even though there has been no assent to the legacy(*o*). The Calcutta High Court has also held that the legatee has a vested right to the legacy even though the assent of the executor is not given(*p*). But in a suit for legacy the plaintiff must show that there are sufficient assets in the hands of the executor or that the executor has assented(*q*).

As regards giving of consent by executor, the legatee has no right to ask for such consent for one year from the testator's death, (sec. 337). But if the executor withholds his consent arbitrarily he may be compelled to give it by Court. (Williams on Executors 12th Edn. 895). The legatee can bring a suit to recover the property bequeathed to him by joining the executor with the transferee to whom the property may have been transferred by the executor(*q*¹).

333. (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations.

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

[This is sec. 293 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 113 & 148 of the Probate and Administration Act V of 1881.]

(k) *Lakshamma v. Ratnamma*, 38 Mad. 474.

(l) *Khagendra v. Khetra Nath*, 50 Cal. 171.

(m) *Indu Prova v. Durga Charan*, 18 Pat. 828.

(n) *Hasanali v. Popatlal*, 14 Bom. L. R. 782.

(o) *Rajah Parthasarathy v. Rajah Venkatahri*,

46 Mad. 191.

(p) *Khajendra Nath v. Khetra Natha*, 50 Cal. 171.

(q) *Okhoy v. Koylash*, 17 Cal. 387.

(q¹) *Vithal v. Narayan*, A. I. R. (1931) N. 69.

Sub-section (1).

Effect of Assent.—The assent once given is irrevocable(*r*). The assent divests the interest of the executor or administrator and vests the thing bequeathed immediately in the legatee(*s*) and the executor becomes a trustee of the things bequeathed for the legatee and he is precluded from dealing with it(*t*). The assent once given relates back to the testator's death, (sec. 386).

Although sub-section (1) applies to specific legacies, the principle laid down in this section applies to all legacies. In the case of a pecuniary legacy if the amount is debited in the books of account of the executor, it will entitle the legatee to the amount(*u*).

When Assent to be given.—Ordinarily the assent is given by the executor after the grant of probate; but the executor may assent before probate (Halsbury Vol. 14, p. 346). For a period of one year the executor is not bound to give his assent; but if after the lapse of one year the executor arbitrarily withholds his consent, the legatee may compel him to do so.

Retraction of Assent once given.—The general rule is that when the executor has once given his assent he can never afterwards retract it. But if the assent has not been completed by payment in the case of a general legacy or possession in case of a specific one, and its recall is not attended with injury to a third person, the executor has the power of retracting it *e.g.* where he assents upon a reasonable ground that the assets would be sufficient to answer all demands, but unknown debts are unexpectedly claimed which occasion a deficiency. (Williams on Executors, 12th Edn. p. 907). Moreover if the assent has been completed by payment or possession and afterwards debts appear of which the executor had no previous notice, he has the further right under sec. 356 to compel the legatee to refund.

Sub-section (2).

Form of Assent.—The assent may be oral or written. It may be express or implied. The assent may be inferred when there is nothing more to be done by way of administration(*v*). It need not necessarily be in any particular form. Allowing the legatee to receive the rent or income or to repair the property would amount to an assent. An assent to a life interest is an assent to the interest in remainder, and conversely an assent to an interest in remainder enures for the benefit of the tenant for life, [see illustration (*iii*)]. In England that was the law upto 1925. After 1925 the law in England is changed, (Halsbury, Hailsham Edn., Vol. 14, pp. 345-346; Williams on Executors, 12th Edn., p. 899). Where all debts have been paid and executor is dead his assent will be presumed, [see ill (*iv*)].

“Unless the nature and circumstances of the Property require that it should be transferred in a particular way.”

In the case of moveable property no particular form of assent is necessary. In case of immoveable property prior to 1925 in England no conveyance or assignment was necessary to complete the title of the specific legatee(*w*). But by the Law of Property Act, 1925 (15 Geo. 5, c. 20) statutory forms of assent are to be executed, (see Halsbury, Hailsham, Edn., Vol. 14, p. 364, note *r*). In India it would seem from the use of the above words that a document of transfer would be

(*r*) *Dia v. Burford*, 19 Beav. 409.

(*s*) *Marie v. Jotindra*, 28 C. L. J. 141.

(*t*) *Trimbak v. Narayan*, 38 Bom. 429;
Charu Chandra v. Bankim Chandra, 42 C. W. N. 1115.

(*u*) *Doe. d. Mabblerley, v. Mabblerley*, 6 C. & P.

126.

(*v*) *Indu Prova v. Durga Charan*, 18 Pat. 828 at p. 836; A. I. R. (1940) Pat. 40.

(*w*) *Re Culverhouse, Cook v. Culverhouse*, (1896) 2 Ch. 251.

necessary to complete the title of the specific legatee, in accordance with the provisions of the Transfer of Property Act and the Registration Act. The cost of such transfer is to be borne by the specific legatee. Also the cost of preservation and upkeep of the property specifically bequeathed between the date of the testator's death and the date of executor's assent are payable by the specific legatee(x). In the case of leasehold property containing a covenant against assignment without the lessor's consent, it is not a breach of covenant if the executors assign it without such consent to the devisee(x¹).

334. The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Conditional
assent.

Illustrations.

(i) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

[This is sec. 294 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 114 & 148 of the Probate and Administration Act V of 1881.]

The condition which an executor is entitled to impose on the legatee before giving his assent is a condition precedent and not a condition subsequent, [see ill(ii)]. An executor has no power to attach as a condition to his assent the performance of some subsequent event by the legatee, (Halsbury, Vol. 14, p. 265 and Hailsham, Edn., Vol. 14, p. 344). In *Halai v. Chaturbhuj(y)*, the executor insisted on the legatee returning a ring belonging to the testator in the possession of the legatee, before giving his assent and it was held that the executor was entitled to impose such a condition. If the legatee is in possession of any property moveable or immoveable which he declines to part with on the ground that it does not belong to the estate of the deceased but it belongs to him, the remedy of the legal representative is to file an administration suit making the legatee a party to the suit and to have the question determined in that suit(z).

335. (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

Assent of executor
to his own
legacy.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

[This is sec. 295 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 115 & 148 of the Probate and Administration Act V of 1881.]

(a) *In re Rooke*, (1883) 1 Ch. 970.

(y) 17 Bom. L. R. 985.

(w¹) *Simon Christopher v. Alfred Christy*, A. I. R. (1939) P. C. 138.

(z) *Motibai v. Nathabhai*, 45 Bom. 1053.

An executor's assent to his own legacy is required on the same principle as his assent in the case of a bequest to another person *viz.* that until he has examined the state of assets, he cannot decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (Williams on Executors, 12th Edn. p. 897). But if an executor legatee renounce probate his assent to his own legacy will be ineffectual; and if he take the thing bequeathed without the permission of the administrator with the will annexed he will incur the same liabilities as any other legatee so acting. If the executor himself is also a specific legatee and after fully administering the estate he died, he may be presumed to have assented to his legacy(a) [see ill. (iv) sec. 335].

Effect of executor's assent.

336. The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

Illustrations.

(i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(ii) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

[This is sec. 296 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 116 & 148 of the Probate and Administration Act V of 1881.]

Retrospective Effect of Assent.—A specific legatee has an inchoate right in the thing bequeathed and he can, therefore, deal with the subject matter of the bequest before the assent is given. This section enacts that the assent relates back to the testator's death and the legatee has the right to the intermediate income and profits of the thing bequeathed(b).

Executor when to deliver legacies.

337. An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

[This is sec. 297 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 117 & 148 of the Probate and Administration Act V of 1881.]

Executor's Year.—An executor has a year within which to inform himself about the state of the property and during that period he cannot be compelled to pay or deliver any legacy. This is called "the executor's year." There is nothing to prevent an executor from paying within one year if he chooses but he cannot be compelled by the legatee to pay within that time even if the testator directs that all the legacies should be discharged within six months(c). This allowance of one year

(a) *Sarat Chandra v. Pramatha*, 37 C. W. N. 118.

(b) *Re West, v. Roberts*, (1909) 2 Ch. 180; *Rex v. Commissioner of Income-Tax*, (1920)

1 K. B. 468.

(c) *Brooke v. Lewis*, 6 Madd. 358; *Macleod v. Sorabjee*, 7 Bom. L. R. 755 (on appeal *Jaiji v. Macleod*, 30 Bom. 493).

is given for convenience in order that the debts of the testator may be ascertained so as to make a proper distribution of the estate. The testator may extend the period by his will(d), (Williams on Executors, 12th Edn., p. 909).

This rule of one year also comes into operation in cases of construction of will when the gift over is made on the donee dying before he actually revives the legacy. In *Re Collison*, *Collison v. Barber*(e) the testator bequeathed his property to trustees upon trust to divide the residue into six equal parts amongst two nephews and four nieces named in the will and directed that the shares of the nephews be paid to them as soon after his death as possible. If any of the nephews died before the division of the estate, his share should go over. All the nephews and nieces survived the testator but one of the nieces died before the expiration of one year. It was held that the division of the estate meant, the expiration of twelve months from the death of testator and that the share of the niece who survived the testator but who died within one year went over. But in *Re Wilkins*(f) the expression "final division of the estate was construed as one year after the death of the testator.

But if a legacy is given subject to a condition subsequent, the divesting contingency will not prevent the legatee from receiving his legacy at the end of one year from the testator's death and he is not bound to give security for repayment of the money, in case the event should happen. For example, a legacy is given to A but if he marries a certain person then to B. A is unmarried at the testator's death, he is entitled to the legacy without giving any security, (Williams on Executors, 12th Edn., p. 910). An executor has no right to demand from the legatee a release on making payment of the legacy. A receipt from the legatee is all that the executor can require a legatee to give(g).

Limitation.—A suit for recovery of a legacy or for a share of a residue bequeathed is to be brought within 12 years when the legacy or share becomes payable, (see Art. 123 of the Indian Limitation Act). A suit to recover arrears of annuity is also governed by the same article(h). But in the case of an annuity once the right to receive a recurring payment is repudiated then Art. 131 will apply(h¹). If the subject of the legacy is encumbered and the legacy is directed to be paid free from incumbrances, the legacy will become payable on the date the incumbrance is discharged(i). According to English law also proceedings to recover a legacy are barred after 12 years next after a present right to receive the same has accrued to a legatee capable of giving discharge for or release of a legacy. In the case of immediate legacy to a person *sui juris* time begins to run from the death of the testator and not from the expiration of one year after his death. (Halsbury, Hailsham, Edn., Vol. 14, p. 341).

A legatee cannot file a suit in the Small Causes Court to recover the amount of the legacy; his remedy is to file a suit for administration(j). An executor as such is not an express trustee for the legatee(k). When the person liable for payment of the legacy and the person entitled to receive it are the same no question of limitation can arise(l).

Rate of Exchange.—If the legacy is bequeathed in sterling, the rate of exchange from dollar to sterling must be ascertained on the first anniversary of the death of the testator(m).

(d) *Adm.-General v. Hughes*, 40 Cal. 192.

(e) 12 Ch. D. 884 (followed in *Re Chaston*, 18 Ch. 218).

(f) 18 Ch. D. 684.

(g) *Mariam Bibi v. Cassim*, A. I. R. (1939) R. 278.

(h) *Rajah Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190. (in appeal) *Venkatadri v. Parthasarathy*, 27 Bom. L. R. 823 P. C.;

48 Mad. 312; *Srimati Hemangini v. Anil Krishna*, 17 Pat. 350.

(h¹) *Ramranbijay v. M. Pd. Singh*, 25 Pat. 311.

(i) *Kajali v. E. P. R. Chettiar*, (1943) Mad. 477.

(j) *Okhoy Coomar v. Koylash*, 17 Cal. 387.

(k) *Barada v. Gajendra*, 13 C. W. N. 559.

(l) *Narrondas v. Narrondas* 31 Bom. 418.

(m) *In re Eighmie*, (1935) 1 Ch. D. 524.

CHAPTER IX.

Of the Payment and Apportionment of Annuities.

338. Where an annuity is given by a will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

Commencement
of annuity when no
time fixed by will.

[This is sec. 298 of the Succession Act X of 1865 and sec. 118 of the Probate and Administration Act V of 1881.]

An annuity given by will runs from the death of the testator; but the first instalment in the absence of a direction to the contrary does not become due until the expiration of the year, (see sec. 339). If a sum of money is directed to be invested in the purchase of an annuity it will not carry interest until the expiration of the year(n). A suit to recover arrears of annuity against an executor is governed by Art. 123 of the Limitation Act(o).

339. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year.

When annuity, to
be paid quarterly
or monthly, : first
falls due.

[This is sec. 299 of the Succession Act X of 1865 with the addition of the words "or administrator." It is in accordance with secs. 119 & 148 of the Probate and Administration Act V of 1881.]

Annuity.—Where an annuity is given and no time is fixed for its commencement it shall commence from the testator's death but the first payment shall be made at the expiration of a year next after that event, (sec. 338). Where the annuity is directed to be paid *quarterly* or *monthly* the first payment shall be due at the end of the first quarter or first month and may be paid when due, but the executor shall not be bound to pay it till the end of the year. If the annuitant dies in the interval an apportioned share of the annuity shall be paid to his representatives, [sec. 340(2)]. Where there is no fund charged for the payment of an annuity a Government annuity shall be purchased, (sec. 343).

340. (1) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorises the first payment to be made.

Dates of successive
payments when first
payment directed to
be made within a
given time or on day
certain death of
annuitant before
date of payment.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

(n) *Re Friend, Friend v. Young*, 78 L. T. 222.

(o) *Srimati Hemangini v. Anil Krishna*, 17 Pat. 350.

[This is sec. 300 of the Succession Act X of 1865 and sec. 120 of the Probate and Administration Act V of 1881.]

Stokes in his commentary observes that this section is a departure from English law as laid down in *Irvin v. Ironmonger*(p). According to that case where a testator gives an annuity to A for life, and directs the first payment to be made within one month from his death, the annuity commences from such date; the first year's payment is paid in advance at the appointed time; the payment for the second year does not become due till the end of that year.

CHAPTER X.

Of the Investment of Funds to provide for Legacies.

341. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may by any general rule authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

[This is sec. 301 of the Succession Act X of 1865 and sec. 121 of the Probate and Administration Act V of 1881.]

This section applies to general legacies and not to specific legacies. If a specific bequest is made to two or more persons in succession the rule is to retain the property specifically bequeathed in the same form, though it be of a wasting nature and notwithstanding that there is danger that one object of the testator's bounty may be defeated by the tenancy for life lasting as long as the property enures.

Where a general legacy or *residue* is bequeathed to a person for life *without* any direction to invest it in any particular securities, the amount of the legacy or the residue or so much thereof as is not invested in authorized securities must be converted into money and invested in authorized securities. It is the duty of an executor or an administrator whenever there are successive interests created in the subject of a bequest or of residue consisting of property in its nature perishable and daily wearing out, to convert the same into money and invest it in authorized securities. This is known in England as **The Rule in *Howe v. Lord Dartmouth***(q) and it amounts to this, that where there is a residuary bequest to be enjoyed by several persons in succession a Court of Equity, in the absence of any evidence of a contrary intention will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, *e.g.*, leaseholds, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous. (As to what are authorized securities see sec. 20 Indian Trusts Act II of 1882 and rule 905 of the Bombay High Court Rules). The rule used to apply to leaseholds in England but since 1925 it no longer applies to leaseholds, (Williams on Executors, 12th Edn., pp. 917-918). Under this rule a tenant for life of residuary personal estate is not entitled to the whole of the income of such investments as are not authorized by the trusts of the will. As a complementary rule the rule in *In re Earl of Chesterfield's Trusts*(r) has been established whereby the tenant for life gets some benefit from a reversionary interest forming part of the testator's estate, which, in the interests of the proper

(p) 2 B. & M. 581.

(q) 7 Ves. 147.

(r) 24 Ch. D. 643.

management of the estate as a whole is not immediately realized. If the real estate is devised on trust for sale the tenant for life is entitled to the whole of the net rents and profits until sale. If the estate produces nothing the tenant for life can get nothing(s).

The rule in *Howe v. Lord Dartmouth* was made for the purpose of holding, as far as possible, an even hand between those whose interests are in capital and those whose interests are in income in respect of the investments which are not authorised by law for the investments of trust funds. The rule was based upon the equitable idea of treating that which ought to be done as having been done and accordingly in the early cases the general rule was that the tenant for life was entitled to whatever the investments, if they were sold and re-invested in Consols, would produce. To that extent he was entitled to payment on account of income. In more recent years the English practice has generally been to give to the tenant for life interest at 4 p.c. upon the capital value of the unauthorised investments, and the general rule now is to allow 4 per cent. to the life tenant. It was held in *Re Fawcett*(t) that in the case of unauthorised investments retained unsold at the end of one year from the death of the testatrix the life tenant should receive interest at the rate of 4 per cent. per annum from the date of the death of the testatrix till realization on their value taken one year after the death. That in the case of unauthorised investments realised during the year following the death of the testatrix the life tenant was entitled to receive that interest on the net proceeds of the realisation from the date of her death to the date of completion. That any excess of income from unauthorised investments beyond the interest payable to the life tenants in respect of such investments ought to be invested in authorised investments as part of the capital with the other unauthorised investments and accordingly the whole of the actual subsequent income of such uninvested excess is payable as income.

In India in such circumstances the combined effects of secs. 345, 346 and 347 lay down the rule of law that, until conversion and reinvestment the tenant for life of the residue is only entitled to interest at 4% in the case of persons other than Hindus and Mahomedans and 6% in case of Hindus and Mahomedans.

The legatee has the right to sue the executor to compel him to invest the amount in accordance with this section if he fails to do so, (Williams on Executors, 12th Edn., pp. 922-923.)

Investment of general legacy, to be paid at future time: disposal of intermediate interest.

342. (1) Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

(2) The intermediate interest shall form part of the residue of the testator's estate.

[This is sec. 302 of the *Succession Act X of 1865* with the addition of the words "or administrator". It is in accordance with secs. 122 & 148 of the *Probate and Administration Act V of 1881*.]

Sub-sec. (1)

Appropriation.—This sub-section provides that when a general legacy is presently vested but is payable in future the legatee has an absolute right to require the amount of the legacy to be invested in the authorized securities. When that is done it would amount to an appropriation in the strict sense of the word(u).

(s) *In re Woodhouse*, (1941) 1 Ch. 332.
(t) (1940) 1 Ch. 402.

(u) *Re Hall, Foster v. Melcalfe*, (1903) 2 Ch 226.

As soon as the investment is made it amounts to a severance of the amount of the legacy from the general estate and the legatee takes it for "better or worse", *i.e.* if the securities appreciate that would be for his benefit and if they depreciate he would have to bear the loss(*v*). This section applies only where the legacy is vested. If the legacy is contingent, this rule does not apply, (see sec. 344). Where the legacy is not contingent it can be appropriated either by payment into Court or by investment(*w*).

The effect of appropriation made pursuant to this section is that the profit or loss in respect of the appropriated fund which the fluctuation of the price of the securities may cause fall upon the legatee(*x*).

Sub-sec. (2).

With regard to interest on general legacies payable at a future date the same will form part of the residue of the testator's estate.

343. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

Procedure when no fund charged with, or appropriated to annuity.

[This is sec. 303 of the Succession Act X of 1865 and sec. 123 of the Probate and Administration Act V of 1881.]

An annuitant is not entitled to have the residuary estate kept in hand to meet his annuity. Under this section his only right is that proper Government securities are purchased to make it practically certain that his annuity will be paid in full. In case of deficiency of income after the investment is made pursuant to this section by the reduction of rate of interest by Government on securities, the annuitant is entitled to have the deficiency made good out of the residuary estate of the testator(*y*). If annuity is given in words "such sum as will produce after payment of tax and all other deductions the clear yearly sum of £60," then a sum sufficient to produce that income including the tax payable on the income must be invested. What might happen in the future whether the tax increased or diminished should not be taken into consideration(*z*).

344. Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due.

Transfer to residuary legatee of contingent bequest.

[This is sec. 304 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 124 & 148 of the Probate and Administration Act V of 1881.]

Where a legacy is given on a contingent event, then the legatee cannot have the legacy separated from the bulk of the testator's estate and appropriated; because it cannot be ascertained what sum of stock or securities will at the time

(v) *Maneckji v. Nanabhai*, 58 Bom. 724.

(w) *In re Hall*, (1908) 2 Ch. 226.

(x) *Great v. Pigot*, Bro. C. C. 105.

(y) *May v. Bennett*, 1 Russ. 370; *Davies v.*

Wattier, 1 Sim. & Stu. 463.

(z) *In re Powell*, *Neale v. Roberts*, (1944) W. N. 221.

of payment produce the exact amount of the legacy. In such cases this section enacts that the executor may transfer the residue of the estate to the residuary legatee, he giving sufficient security to the contingent legatee for the payment when the contingency happens. The same state of law prevailed in England upto 1926. Since 1st January 1926 the personal representation has been given power of appropriation of contingent bequests also, (Williams on Executors, 12th Edn., p. 924).

When there is a contingent legacy and interest is not given to the legatee in the meantime the interest will form part of the residue if the contingency does not happen. But if interest in the meantime is given to the legatee or if there is a direction to accumulate interest, the executor is entitled to sever the amount of the contingent legacy from the residue(a). If appropriation is made and the securities depreciate in value the loss does not fall on the legatee. But if the executor has set apart an ample sum to answer the contingent legacy and has invested it, he will not be personally liable to make good the loss if it should turn out that the sum so retained is not sufficient to answer the contingent legacy(b).

345. (1) Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities.

Investment of residue bequeathed for life, without direction to invest in particular securities.

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

[Clause (1) is sec. 305 of the Succession Act X of 1865.]

Sub-sec. (1).

The rule laid down in this sub-section is the amplification of the rule in *Hove v. Lord Dartmouth* treated in sec. 341. Where the residue is bequeathed for life with remainder over without any direction for investment then in order to give effect to the will the duty of the executor is to convert such part of the estate as are of a hazardous nature and invest the amount in authorized securities(c).

346. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

Investment of residue bequeathed for life, with direction to invest in specified securities.

[This is sec. 306 of the Succession Act X of 1865 and sec. 125 of the Probate and Administration Act V of 1881.]

Executors acting under a will by which *an absolute discretion is given to them to postpone the sale and conversion of the testator's estate*, are not bound to convert the property within a year, even though some of the property consists of shares in an unlimited company, or of a business carried on by the testator, nor will they be

(a) *Manekji v. Nanabhai*, 31 Bom. L. R. 969. (c) *Pickering v. Pickering*, (1839) 4 My. & Cr. 289.
(b) *Re Hall, Foster v. Metcalfe*, (1903) 2 Ch. 226.

liable in the absence of *mala fides* for loss arising to the estate by non-conversion. So, too, an express power to retain existing investments or to invest the amount in securities directed by the will takes the case out of the rule as to conversion of perishable property.

This section lays down that the rule as to conversion and investment laid down in sec. 345 is not to be applied in cases where there is an indication in the will of an intention that the property should be either enjoyed *in specie* or where the will indicates that the investment should be made in certain specified securities.

347. Such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit; and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested :

Time and manner
of conversion and
investment.

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

[This is sec. 307 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 126 & 148 of the Probate and Administration Act V of 1881.]

Time for Making Conversion.—The general rule is that a year is a reasonable time within which an executor should realize the investments which are not proper to be retained. The rule has been described as a *prima facie* and not a fixed rule(d). This section gives to the executors and administrators a discretion. The Court will not control such discretion unless there is an abuse of discretion(e). But if the executors or administrators do not convert within the year, they will have to show some reasons why they did not do so(f). He must make the fund productive and for that purpose he must invest the money in some form of security. If he fails to do so he will be personally liable to make good the loss(g).

Where the executors are given a discretion by the will as to the retention or postponement of the conversion of existing securities, they are not liable for mere errors of judgment if they act honestly and with ordinary prudence, (Williams on Executors, 12th Edn., pp. 912-913). In *Re Gunthor's Will Trusts*(h), there was a great delay in conversion and the securities had either increased or depreciated in value. It was held that for the purpose of valuation the right date to be taken should be the date of the death of the testator.

Interest until Conversion.—Until the conversion and investment takes place the tenant for life is entitled to receive interest at the rate of 4% per annum on the market value of the part of the estate which has not been converted. The market value of the estate is to be ascertained as at the date of the death of the testator.

The proviso to the section gives the rate of interest at 6% in case when the testator is a Hindu, Sikh, Jaina, Buddhist or a Mahomedan.

(d) *Gräfsbörn v. Clarkson*, (1868) 3 Ch. App. 605.

(e) *In re Bryant*, (1894) 1 Ch. D. 324.

(f) *Hughes v. Empson*, 22 Beav. 181.

(g) *In the Goods of Stock*, 54 All. 605.

(h) *Alexander v. Gunthor*, (1889) W. N. 265.

348. (1) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

[This is sec. 308 of the Succession Act X of 1865 and sec. 127 of the Probate and Administration Act V of 1881.]

Legacy to a minor.—Where a legacy is given to a person who is a minor and there is no direction in the will to pay it to any person on his behalf the executor shall pay the same—

- (1) To the District Judge by whom the probate or letters of administration with the will annexed are granted to the account of the legatee, or
- (2) Into the Court of Wards if the legatee be a ward of that Court.
- (3) To the guardian of the property of the minor appointed under the Guardian & Wards Act.

The money so paid shall be invested in authorized securities which with the interest shall be paid to the person entitled thereto or otherwise applied for his benefit as the Judge or the Court may direct.

In case of a minor if the legacy is *immediately* payable the executor must pay the legacy into Court. He would not be justified in paying the legacy to the father or any other relation of the minor, without the sanction of the Court. If the legacy is paid to the father even with the most honest intentions, the executor will nevertheless be held liable to pay it over again to the legatee on his attaining majority, (Williams on Executors, 12th Edn., pp. 928-929). But where the executor is directed to pay the legacy not to the child but to a *trustee* or to any other person for him the executor will be justified in paying the legacy to the trustee or to the person to whom the legacy is directed to be paid.

If the executor does not pay into Court but appropriates a sum of money to answer the legacy and invests it in authorized securities, and the securities depreciate in value, he may not be personally liable(i). But the best course for the executor is to act according to the provisions of this section and to pay it into Court.

Where interest on legacies given to children is directed to be paid to their parents and applied by them for their maintenance, the parents take subject to no account(j). And a gift to the parent for the benefit or maintenance of himself and his children may be safely paid to the parent(k). (Theobald on Wills, 7th Edn., p. 498). Where the parents of the minor legatee are unable to maintain him, the Court will order maintenance out of the interest of the legacy under this section even though the income may be expressly directed to be accumulated. But no such allowance will be made by the Court if the parents are able to maintain the legatee.

CHAPTER XI.

Of the Produce and interest of Legacies.

Legatee's title to produce of specific legacy.

349. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(i) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of B.

(ii) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(iii) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and A's completing 18, form part of the residue.

[This is sec. 309 of the Succession Act X of 1865 and sec. 128 of the Probate and Administration Act V of 1881.]

Interest and Produce of Specific Legacies.—An immediate specific legacy carries with it all accretions from the date of the testator's death. But a contingent specific legacy does not carry with it the intermediate income. Such income or produce will form part of the residue, unless it has been directed to be set apart. In England the law is changed by the Law of Property Act, 1925 (15 Geo. V, ch. 20 secs. 164-166), (Halsbury, Vol. 14 and Hailsham Edn., p. 355). If there is no residuary legacy it will go to the next-of-kin, as undisposed of(l), (sec. 350).

Residuary legatee's title to produce of residuary fund.

350. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

(j) *Hammond v. Neame*, 1 Sw. 85.

(k) *Cooper v. Thornton*, 3 Bro. C. C. 96, 186.

(l) *Guthrie v. Walron*, 22 Ch. D. 578. at p.

578; *In re Buxton, Buxton v. Buxton*, W. N. (1930) p. 85.

Illustrations.

(i) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(ii) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

[This is sec. 310 of the Succession Act X of 1865 and sec. 129 of the Probate and Administration Act V of 1881.]

An immediate general residuary legacy carries interest from the testator's death. Even where the payment of legacy is postponed till the legatee attains a particular age or marries interest on it is payable to the legatee from the death of the testator until the date of payment (see ill. i). But if the bequest is contingent in its terms as in illustration(ii), i.e., where the expression used is "when" then the contingent gift of residue does not carry intermediate income and that income goes as undisposed of and will go to the next-of-kin(m). Under English law there is a difference. If the contingent gift of residue is of personal estate, it carries the intermediate income. But if the contingent gift of residue is of real estate it does not, (Halsbury, Vol. 14, Hailsham Edn., pp. 854-856).

Interest when no time fixed for payment of general legacy.

351. Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

[This is sec. 311 of the Succession Act X of 1865 and sec. 130 of the Probate and Administration Act V of 1881.]

Interest and Produce of General Legacies.—Where no special time is fixed for the payment of a general legacy, it carries interest from the expiration of one year after the testator's death and in this respect a demonstrative legacy stands on the same footing as a general legacy. But if the legacy is made payable "immediately after my death," these words will entitle the legatee to claim interest from the date of the death of the testator(n).

Demonstrative Legacy.—According to the English law interest is payable on the demonstrative legacy from the expiry of one year from the testator's death(o). The same is the law in India(p).

Bequest for life.—If a sum of money is given to one for life with remainder over, interest begins to run from the end of a year from the testator's death, though no interest becomes due till the end of two years(q).

(m) *Raja Parthasarathy v. Raja Venkataadri*, 46 Mad. 190.

(n) *In re Pollock*, (1948) W. N. 210.

(o) *In re Walford*, *Kenyon v. Walford*, (1912) 1 Ch. 219.

(p) *Chinnam v. Tadikonda*, 29 Mad. 155; *Adm.-General v. A. D. Christiana*, 43 Cal. 201; *Sahib Mirza v. Umda Khanam*, 19 Cal. 444.

(q) *Gibson v. Bott*, 7 Ves. 96.

Exception.—Interest will begin to run from the death of the testator where no time is fixed for payment in the following three cases—

- (a) Where the legacy is bequeathed in satisfaction of a debt(r). but a legacy in lieu of dower carries interest from the expiration of the year(s).
- (b) Where the testator was a parent or a more remote ancestor of the legatee or had placed himself in *loco parentis* to the legatee. A legacy to a wife does not carry interest until a year from the death(t). (Halsbury, Vol. 14, Hailsham Edn., p. 354).
- (c) Where the legacy is given to a minor with a direction to pay for his maintenance out of it.

352. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time when so fixed. The interest up to such time forms part of the residue of the testator's estate.

Interest
time fixed.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

[This is sec. 312 of the Succession Act X of 1865 and sec. 131 of the Probate and Administration Act V of 1881.]

Sec. 351 deals with the case where no time has been fixed for the payment of a general legacy. This section deals with the case where such time has been fixed by the testator. The rule laid down in this section is that the legatee is not entitled to interest till the time when the legacy is payable. The intermediate interest will fall in the residue. The cases contemplated by this section are two—

- (a) a legacy vested in interest but payable at a future date,
- (b) a contingent legacy payable on the happening or not happening of an event, e.g., the legatee attaining a certain age.

Exception.

The rule that a contingent legacy does not carry interest does not apply in a case where the contingent legacy is given by a parent or by a person in *loco parentis* to a child who is a minor, because the Court infers that the testator intended that the child should be maintained and if no other provision is made for maintenance the Court will presume that the testator intended the child to be maintained out of the only fund available viz., the interest on the contingent legacy(u). It is only where the contingent legacy is given to a child of the testator on attaining majority and no other provision is made for maintenance that this inference is to be drawn. If the contingency is one which may happen after the attainment of majority, e.g., on the child attaining the age of 25 the inference may not be drawn under this section. But the Court is not precluded from drawing such an inference in a proper case especially if no provision for maintenance is made(v).

(r) *Rajamannar v. Venkatakrishnayya*, 25 Mad. 361.

(s) *Re Bignold*, *Bignold v. Bignold*, 45 Ch. D. 496.

(t) *Rajantkant v. Kiko*, 34 Bom. L. R. 1124; A. I. R. (1932) B. 506.

(u) *In re Abrahams*, (1911) 1 Ch. 108.

(v) *In re Jones*, (1932) 1 Ch. 642 at 650.

353. The rate of interest shall be four per cent. per annum in all cases except when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, in which case it shall be six per cent. per annum.

[This is sec. 313 of the Succession Act X of 1865 and sec. 132 of the Probate and Administration Act V of 1881.]

Rate of Interest.—4% in cases of Europeans, Anglo Indians, Parsis, and Native Christians.

6% in cases of Hindus, Sikhs, Buddhists, Jains and Muhammadans.

The interest payable is simple interest and not compound interest^(w). Only six years' arrears of interest can be recovered in respect of a legacy under English law and the rate of interest is also 4%. But the legatees who wait for the payment of their legacies until after the falling in of a reversionary interest are entitled to interest from the expiration of one year after the testator's death, (Halsbury, Vol. 14, p. 275, Hailsham Edn., Vol. 14, p. 354.)

In India also the period is six years under art. 120 of the Indian Limitation Act.

354. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

[This is sec. 314 of the Succession Act X of 1865 and sec. 133 of the Probate and Administration Act V of 1881.]

According to English law arrears of annuity do not carry interest, even though the annuity be intended as a provision for a wife or child, (Halsbury, Vol. 14, p. 274, Hailsham Edn., Vol. 14, p. 356). According to this section annuities do not carry interest for the first year only, though an earlier time may have been fixed for its payment. It is, therefore, implied that the Legislature contemplated interest on arrears of interest after one year^(x).

355. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

[This is sec. 315 of the Succession Act X of 1865 and sec. 134 of the Probate and Administration Act V of 1881.]

This section is also a departure from English law. According to English law no interest is payable on an annuity, although it may be charged on corpus as well as on income, (Halsbury, Vol. 14, p. 274, Hailsham Edn., Vol. 14, p. 356). According to this section if a sum of money is directed to be set apart and directed to be invested to produce an annuity interest is payable from the date of the testator's death.

CHAPTER XII.

Of the Refunding of Legacies.

356. When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assest proving insufficient, to pay all the legacies.

Refund of legacy paid, under Court's orders.

^(w) *Hurjeevandas v. Davidas*, Perry's O. C. 54.

^(x) *Srimati Nalimbala v. Adm.-General of*

Bengal, (*Times of India*, 22nd June 1938, p. 14).

[This is sec. 316 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 135 & 148 of the Probate and Administration Act V of 1881.]

The general rule is that an executor who has voluntarily paid a legacy cannot call upon the legatee to refund if the assets prove insufficient to pay all the legacies. (See sec. 357). This section is an exception to this rule. According to this section the executor is entitled to call upon a legatee to refund in case of deficiency of assets where he has made the payment under compulsion of an action. The same is the law in England, (Halsbury, Vol. 14, p. 278, Hailsham Edn., Vol. 14, p. 360.)

357. When an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

[This is sec. 317 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 136 & 148 of the Probate and Administration Act V of 1881.]

This is the general rule that whenever an executor or administrator pays a legacy voluntarily and the assets prove insufficient to pay the rest of the legacies, he cannot call upon the legatee who has received his legacy to refund. In such a case the Court will oblige him to pay the rest of the legacies himself if he is solvent from his own moneys and the Court will not permit him to institute proceedings against any of the legatees so paid by him to refund(y). When the executor becomes insolvent even then the legatee cannot be compelled to refund if the estate was in the first instance sufficient to satisfy all the legacies, (Halsbury, Vol. 14, p. 278, Hailsham Edn., Vol. 14, pp. 360-361).

358. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon without fraud, distributed the assets ; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed under section 137.

[This is sec. 318 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 137 & 148 of the Probate and Administration Act V of 1881.]

Under sec. 137 where a legacy is given to A on his performing a condition within a specified time and in default to B, if A fails to perform the condition within the time specified, the executor is justified in paying the legacy to B. This section provides that in such a case if A was prevented from performing the condition by fraud and if further time is given to him under sec. 137 for the performance of the condition and if A fulfills the condition within such further time then A can call upon B to refund ; that is his only remedy ; he cannot call upon the executor to pay the legacy.

359. When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

When each legatee compellable to refund in proportion.

[This is sec. 319 of the Succession Act X of 1865 with the addition of the words "or administrator". It is in accordance with secs. 138 & 148 of the Probate and Administration Act V of 1881.]

Under sec. 325 it is the duty of the executor or administrator to pay the debts of every description before paying any legacy. Sec. 323 requires that all such debts as the executor or administrator knows of shall be discharged by him as far as the assets will extend. In order to enable an executor or administrator to ascertain the debts of the deceased sec. 360 provides for giving of notice.

If the executor or administrator with notice of a debt has parted with the residue of the estate to the residuary legatee he cannot call upon the latter to refund. This section provides that when the executor or administrator has parted with the residue without notice of a debt, and debts are subsequently discovered which he is obliged to pay, he can call upon the residuary legatee to refund. This section speaks of refund by each legatee in proportion. But that does not mean all the legatees; the first person to refund would be the residuary legatee if there is a single residuary legatee. If there are more than one residuary legatees, they would be liable to refund *pro rata*. If there are no residuary legatees, then the general legatees are liable to refund *pro rata* and lastly the specific legatees, (see secs. 327, 328 and 330).

This section speaks of refunding by legatees, but the same principle would apply if the estate is distributed amongst the next-of-kin in case of intestacy.

The refunding under this section will be of the capital amount only and not of interest, (see sec. 365).

Debt of which he had no Previous Notice.

Notice at the time of distribution of a mere liability which does not constitute a debt does not prevent an executor under this section from subsequently calling upon the residuary legatee to refund(z). There must be debt actually due.

360. Where an executor or administrator has given such Distribution of notices as the High Court may, by any general assets. rule, prescribe or, if no such rule has been made, as the High Court would give in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution.

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

[This is sec. 320 of the Succession Act X of 1865 with the addition of the words "as the High Court may, by any general rule prescribe or, if no such rule has been made," after the word notices. It is in accordance with sec. 139 of the Probate and Administration Act V of 1881.]

Distribution of Assets.—This section is based on statute 22 and 23, Vict. c. 85, s. 29, Lord St. Leonard's Act. Prior to the passing of this statute an executor was not safe in distributing the assets except under the directions of the Court. This statute afforded a less expensive remedy and is adopted by the Indian Legislature. Rules have been framed by the High Courts under this section. It

(z) *Jervis v. Wolferston*, (1874) L. R. 18, Eq. 18.

would be proper for an executor or an administrator, prior to distributing the assets amongst the legatees or next-of-kin as the case may be, to give a notice under this section inviting all creditors and other claimants of the deceased to send in their claims to the executor or administrator within the time specified in such notice. The word "distribute" covers all payments in discharge of the claims of creditors(a). (For form of notice see Form No. 130, Bombay High Court Rules, p. 334).

On the expiration of the period prescribed in the notice and after satisfying the claims (if any) received in pursuance thereof the executor or administrator may distribute the assets and in such a case he will not be liable to any creditor of the deceased who may apply for the payment of his debt thereafter. The creditor's remedy in such a case is to follow the assets in the hands of the legatees or the next-of-kin of the deceased as the case may be. The proviso restricts the effect of the notice to the liability of the executor alone(b).

If the estate of the deceased is subject to any contingent or future liabilities it is the duty of the executor or administrator before distributing the estate amongst the legatees or next-of-kin to take a sufficient indemnity from them to meet the liabilities whenever they may become due under sec. 344. In case of legacies payable at a future date before distributing the assets it is the duty of the executor to make a proper provision for such payment when the legacies would become payable. In such cases question arises as to what course the executor should adopt whether he should invest the amount in the investment authorized and if so on whom will the increase or decrease in the value of the securities would fall when the legacies become payable or whether the executor should deposit the amount in Court. According to the English law prior to the passing of the Administration of Estates Act, 1925, an executor could not by appropriating the amount of a pecuniary legacy given to an infant and investing the same in any investment in which moneys under the control of the Court ought properly to be involved render himself free to distribute the residue without incurring personal liability in respect of the legacy, if the fund so created should prove insufficient to pay the legacy in full upon the infant's coming of age(c). By sec. 42 of the Administration of Estates Act, 1925, this is changed and it is provided that the personal representative of a testator is not to be deemed to have incurred any liability if he invested a legacy given to an infant in proper funds or because of his failure to pay or transfer the legacy on money into Court. The same law is enunciated by sec. 312 in the case of a general legacy payable at a future time. If the legacy is a vested legacy payable in future not only the legatee has the right to require it to be invested but he can insist in the same being done.

Proviso.

The proviso to this section does not create a right but it saves one. The expression "follow the assets" is commonly used in cases of trust property. A creditor has got right to follow the assets in the hands of the legatees. A creditor who is vigilant and takes a dividend in an administration suit is not to suffer in favour of another creditor who has not been vigilant and has not come forward to claim his debt. He has no right to sue the other creditors for refund(d).

361. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the

Creditor may call upon legatee to refund.

(a) *Mathuradas v. Raimal*, 37 Bom. L. R. 642.

(b) *Mathuradas v. Raimal*, *supra*.

(c) *In re Solomon, Public Trustee v. Wortley*,

(1920) 1 Ch. 290.

(d) *Kisondas v. Jivallal*, 38 Bom. L. R. 864, A. I. R. (1936) B. 423.

time of his death to pay both debts and legacies ; and whether the payment of the legacy by the executor or administrator was voluntary or not.

[This is sec. 321 of the *Succession Act X of 1865* with the addition of the words "or administrator". It is in accordance with secs. 140 & 148 of the *Probate and Administration Act V of 1881*.]

When a Creditor can compel a Legatee to Refund.

Ordinarily an unpaid creditor's remedy is against the executor or administrator; he has no right against the legatee. But when an executor or administrator has distributed the estate after giving the requisite notice under sec. 360, the executor or administrator is exonerated from any personal liability if a creditor subsequently turns up and makes a claim. In order to do justice and to avoid the evil of allowing the beneficiary to retain a thing which is legally applicable to the payment of the debts of the deceased, the Court of equity devised a remedy of following the assets in the hands of the beneficiaries and this equitable rule has been adopted in this section. A creditor who has not received payment can only call upon a legatee to refund whether residuary, general or specific the amount of the legacy to the extent of satisfying fully the amount of the debt due to the creditor. A creditor cannot compel another creditor who may have received full payment to refund. This right of an unsatisfied creditor to follow the assets in the hands of a legatee and to compel him to refund is only against volunteers claiming through the legatees ; but they have no right against a *bona fide* purchaser from the legatee, (Halsbury, Vol. 14, p. 280, Hailsham Edn., Vol. 14, p. 362). It is a right which can only be exercised by a suit and not by levying execution proceedings(e). But if the creditor has filed a suit against the testator and pending the suit the testator dies and the executor is brought on the record and a decree was passed in favour of the creditor, the creditor can exercise the right against the executor who was also a legatee under the will by executing the decree(f). The legatee has no defence except one of limitation. He cannot plead that the payment was made to him voluntarily or under an order of the Court. He cannot also plead that at the time when the estate was distributed and the legacy paid there were sufficient assets in the hands of the executors or insufficient assets. According to English law the legatee has equitable defences open to him of laches, acquiescence or other conduct which would render it unjust to allow the creditor to assert his right against the legatee, (Halsbury, Vol. 14, p. 279, Hailsham Edn., Vol. 14, p. 361). It is submitted that under this section such defences are not open to him as the section gives an absolute right to the creditor.

So long as the estate is being administered by the Court, and the assets are under the control of the Court, a creditor who has not received payment can come in and claim against the fund in Court, (Halsbury, Vol. 14, p. 279, Hailsham Edn., Vol. 14, p. 362). A creditor who for some reason or other has been excluded from a first dividend and later on has his claim admitted is entitled to have his claim satisfied to the extent of the first dividend out of the further assets before any further dividend is paid to others(g).

Remedy of the Legatee who is called upon to refund.—(See commentary to sec. 363).

Limitation.—Under Art. 48 of the Limitation Act the period of limitation is 8 years from the date of payment of the legacy for a claim by the creditor for refund under this section.

(e) *Jay Chandra v. Naba Chandra*, 34 C W. N. 761.

M 209.

(f) *Chokkalingham v. Raman*, A. I. R. (1946)

(g) *Snee v. Prescott*, 1 Atk. 246.

362. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

[This is sec. 322 of the Succession Act X of 1865 and sec. 141 of the Probate and Administration Act V of 1881. The word "administrator" does not appear in this section, but it appears to be omitted by oversight.]

The law in England is that when the executor is solvent a legatee who has been voluntarily paid cannot be called upon to refund at the instance of an unpaid legatee. Where the executor becomes insolvent, and the estate was sufficient in the first instance to satisfy all the legacies then also the legatee cannot be compelled to refund, (Halsbury, Vol. 14, p. 278, Hailsham Edn., Vol. 14, pp. 360-361). This section lays down the same law; the remedy of the unpaid legatee is only against the executor if the assets were originally sufficient to satisfy all the legacies and the deficiency arises subsequently by the wasting of the executor.

Similarly as between residuary legatees where one has received his share of the residue, the others cannot call upon him to refund if the estate is subsequently wasted by the executor(h).

363. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

[This is sec. 323 of the Succession Act X of 1865 with the addition of the words "or Administrator". It is in accordance with secs. 142 & 143 of the Probate and Administration Act V of 1881.]

When a "Legatee" can compel another Legatee to Refund.—A legatee can compel another legatee to refund only in two cases :—

(a) Under this section :—If the assets were *not originally sufficient* to satisfy all the legacies an unsatisfied legatee must first proceed against the executor, if he is solvent, for the payment of his legacy. If the executor is insolvent or not liable to pay, the unsatisfied legatee may compel a satisfied legatee to refund in proportion. *i.e.*, by such sum as the satisfied legatee ought to have been reduced if the estate had been properly administered. A legatee who has not received payment under this section would include a legatee who has been compelled to refund.

(b) Under section 358 :—Where a legacy is *conditional* and the time prescribed for the performance of the condition has elapsed and the executor has distributed the estate and further time has been given to the legatee to perform the condition, because he was prevented from performing the condition by fraud and the condition is performed, the legatee may compel the other satisfied legatees to refund. He cannot sue the executor.

Limit to refunding of one legatee to another.

364. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

[This is sec. 324 of the *Succession Act X of 1865* and sec. 143 of the *Probate and Administration Act V of 1881*.]

The limit of refunding by one legatee to another is *pro rata* on the same principle as abatement.

Refunding to be without interest.

365. The refunding shall in all cases be without interest.

[This is sec. 325 of the *Succession Act X of 1865* and sec. 144 of the *Probate and Administration Act V of 1881*.]

The refunding shall be of the capital amount only and not of any interest realized by the legatee(*i*).

366. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Residue after usual payments to be paid to residuary legatee.

[This is sec. 326 of the *Succession Act X of 1865* and sec. 145 of the *Probate and Administration Act V of 1881*.]

Residuary Legatee.—After all the debts and legacies are paid the executor must pay the surplus or residue to the residuary legatee (if any) appointed by the will. "A residuary legatee has a right to insist that in the course of the first year after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses so that the clear residue may be ascertained and paid over to him"(*j*), or if he has a life interest it may be secured for the benefit of the persons successively entitled(*k*).

367. Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 260, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or

Transfer of assets from British India to executor or administrator in country of domicile for distribution.

(i) *Jervis v. Wolferston*, (1874) L. R. 18, Eq. 18.

(j) *McLeod v. Sorabji*, 7 Bom. L. R. 755;

Ganoda v. Nalini, 86 Cal. 28.
(k) *Wightwick v. Lord*, 6 H. L. C. 217.

administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

[This is sec. 326A of the Succession Act X of 1865 and sec. 145A of the Probate and Administration Act V of 1881.]

If a person whose domicile is not in British India dies leaving assets at two places, *viz.*, in the country of his domicile and also in British India, then this section gives to the Indian executor or administrator two courses, (1) he may distribute the surplus amongst the persons entitled thereto according to the law of domicile or (2) he may transfer the residue to the representative of the deceased in the country of domicile.

CHAPTER XIII.

Of the Liability of an Executor or Administrator for Devastation.

368. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

[This is sec. 327 of the Succession Act X of 1865 and sec. 146 of the Probate and Administration Act V of 1881.]

Liability of Executors or Administrators for Devastation.

An executor or administrator is in a sense a trustee and for all breaches of trust he is personally liable. This section makes an executor or administrator personally liable in two cases.—

(a) For maladministration, *i.e.*, when he misapplies the estate of the deceased and

(b) For wilful default, *i.e.*, when he subjects it to loss or damage.

There is a third case provided in section 369 which makes the legal representative personally liable for *negligence*, *i.e.*, if he neglects to get in any part of the property. (For acts of negligence see commentary to sec. 369).

The violation of these duties is termed "*devastavit*." The term *devastavit* applies to the misapplication of the estate as well as to maladministration. A suit on *devastavit* is a legal right of action and Art. 120 of the Indian Limitation Act applies (l), (Halsbury, Vol. 14, p. 320).

Two principal rules, however, must be borne in mind before an executor or an administrator can be made liable for devastation :—1st, that the Court is extremely liberal in making every possible allowance and cautious not to hold executors or administrators liable upon slight grounds, because that would deter persons from undertaking these offices ; 2nd, that care must be taken to guard against an abuse of their trust (m).

Counsel's advice will not protect an executor or administrator against liability for *devastavit*. The Court will proceed not upon what advice the executor got but upon the merits of the acts he has done. "If under the best advice he could

(l) *Lacons v. Warmoll*, (1907) 2 K. B. 350.

(m) *Powell v. Evans*, 5 Ves. 848.

procure he acts wrongly it is his misfortune, but public policy requires that he should be the person to suffer."(*n*).

(A) *By Maladministration :*

What are Acts of Devastavit by maladministration :

- (a) Payment of debts otherwise than rateably and in due order of payment.
- (b) Payment of legacies without providing for the payment of debts.
- (c) Payment of claims which the legal representative has no right to pay, e.g., where an executor paid Rs. 100 to a physician who had attended on the testator without any fees for many years(*o*).
- (d) Mixing up the moneys of the estate with his personal moneys in bank(*p*).
- (e) Payment to a legatee of a sum greater than warranted by the existing state of assets.
- (f) Collusively selling the goods of the deceased at an undervalue(*q*).
- (g) Applying estate money in undue funeral expenses of the deceased(*r*).
- (h) Lending moneys of the estate on personal security(*s*).
- (i) Allowing moneys of the estate not required for immediate purposes unproductive in the bank(*t*).
- (j) Investing moneys belonging to the estate in unauthorised investments(*u*).

What are Not Acts of Devastavit :

(a) An executor pays a debt proved to be justly due but which is barred by the law of limitation. This is not a *devastavit*, because an executor is not bound to plead limitation(*v*). It would be a *devastavit* if the executor pays a debt which has been judicially declared to be barred by limitation(*w*).

(b) An executor has authority to compound a debt due to the deceased and will not be charged for *devastavit* if he has exercised his discretion honestly and fairly in giving time to a debtor, although loss may result from delay(*x*).

(c) An executor is not bound to effect insurance and if the goods of the testator are lost by fire, he is not responsible(*y*).

(B) *By Subjecting the Estate to Loss or Damage.*

Under English law before the Judicature Acts there was a difference between executors and trustees as regards the personal liability for the loss of assets. Trustees were unknown to common law and equity never held them liable for loss of trust property due to inevitable accident. But the executors were known to common law and his liability was placed on the same footing as that of a bailee. But equity treated him with some lineancy and would not charge him for loss of assets come to his hands unless some wilful default was proved against him. A person is not guilty of wilful default unless he knows that he is committing and intends to commit a breach of his duty or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty(*z*). *City Equitable Fire Insurance* was the case of the liability of the directors of a company but the principle

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| (n) <i>Doyle v. Blake</i> , 2 Sch. & Lef. 281 ; <i>Re Knight's Trusts</i> , 29 Beav. 49. | (v) <i>Norton v. Frecker</i> , 1 Atk. 526. |
| (o) <i>Shallcross v. Wright</i> , 12 Beav. 505. | (w) <i>Midgley v. Midgley</i> , (1893) 3 Ch. 282. |
| (p) <i>In re De Cowie</i> , 6 Cal. 70 ; <i>Tulsamma v. Venkatasubbayya</i> , 48 Mad. 697. | (x) <i>Re Houghton</i> , (1904) 1 Ch. 622 ; <i>Chidambaram v. Krishnasami</i> , 39 Mad. 365 ; see contra <i>Khusrubai v. Hormajsha</i> , 17 Bom. 687. |
| (q) <i>Rice v. Gordon</i> , 11 Beav. 265. | (y) <i>Fry v. Fry</i> , 27 Beav. 146. |
| (r) <i>Stackpoole v. Stackpoole</i> , 4 Dow. 227. | (z) <i>Re City Equitable Fire Insurance</i> , (1925) Ch. 407. |
| (s) <i>Holmes v. Dring</i> , 1 Cox. 1. | |
| (t) <i>Moyle v. Moyle</i> , 2 Russ. & M. 710. | |
| (u) <i>In re Fawcett</i> , (1940) 1 Ch. 402. | |

laid down in that case was applied to trustees in *Re Munton*(a) and *Re Vickery*(b), (see Hanbury, Modern Equity, pp. 316-317).

A *devastavit* under this head arises in respect of the following acts :—

(a) An executor has a lease for years determinable on the life of A which is worth £200. The executor does not sell it but keeps it and A dies in a short time. This is *devastavit* and the executor must make up for the value, for it was his own fault that he would not sell it(c).

(b) A debt is payable on demand with interest. The executor does not pay it though he has sufficient funds and a decree is passed with interest and costs. This is *devastavit* for interest and costs(d).

As regards the personal liability of an executor formerly retaining the investments in which he finds the estate moneys at the time when he took over charge the law stands thus.—In respect of investments not authorized as provided in secs. 341, 342 and 345 it is the duty of the executor to convert the unauthorized securities into authorized securities within one year from the date of the death of the testator. If he allows them to remain he is liable for the loss arising therefrom, however prudent he might think the investment to be(e). If by the will the executors are authorized to retain the investments of the testator the executor is not liable to make good the loss through the fall in value of the security, provided in so doing he has acted honestly and prudently. (Hanbury, Modern Equity, p. 250).

As regards the investments authorized by sec. 20 of the Indian Trusts Act, the investment that has given rise to litigation is the investment on the mortgage of immoveable property. The executor should always obtain a report as to the value of the property and he should never advance more than two-thirds of the value stated in the report.

As regards the personal liability of the executor for admission of assets to the creditor the English doctrine of admission of assets is not applicable to India. If therefore the executor enters into an agreement with the creditor of the deceased to give time to the executor to pay off the liability and as consideration gives security of the estate or agrees to pay a higher rate of interest, the personal liability of the executor will depend on the facts of each case, the question to be considered by the Court being whether the executor has done so and to what extent the creditor has agreed(e¹).

Personal Liability of Executors for failure of Bankers.—With regard to losses sustained by the failure of bankers with whom the executor has deposited the moneys the rule is that when the money is deposited by the executor from necessity or from common usage, the executor will not be responsible for the loss(f) (Williams on Executors, 12th Edn., pp. 1192-1193). But he must deposit the testator's moneys on a distinct and separate account. If he mixes up the testator's moneys with his own in his personal bank account and if the banker fails, the executor will be liable for the loss(g). The beneficiary will have a charge on the full amount remaining in the bank in the mixed account in preference to the personal claim of the executor for his amount(h).

In allowing the moneys to remain deposited with a banker the executor must act as a man of ordinary prudence. If he allows a considerable portion of the assets of the testator unproductive in the hands of a banker and the banker fails, the executor will be personally liable(i). Under sec. 30 of the Indian Trusts Act the trustees are not liable for losses due to the default of any banker, broker or other

(a) (1927) 1 Ch. 262.

(b) (1981) 1 Ch. 572.

(c) *Phillips v. Phillips*, 2 Freem. 12; *Fry v. Fry*, 27 Beav. 144.

(d) *Seaman v. Everard*, 2 Lev. 40.

(e) *Mahomed v. Atshabai*, 36 Bom. L. R. 1155.

(e¹) *Sir Jamshedjee Jeejeebhoy v. Sorabjee Byramjee*, (1940) Bom. 534 (P. C.).

(f) *Churchill v. Hobson*, 1 P. Wms. 243.

(g) *Wren v. Kirton*, 11 Ves. 377.

(h) *Re Hallett's Estate*, 13 C. D. 696.

(i) *Moyle v. Moyle*, 2 Russ. & M. 710.

person in whose hands any trust property may be placed unless such loss is caused by the trustees own wilful default. If the trustee is only guilty of an error of judgment it does not amount to wilful default(*j*).

Devastavit of Co-executor.—A *devastavit* by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it. It is, however, the duty of all the executors to watch over and if necessary to correct the conduct of each other(*k*). Under ordinary circumstances an executor will not be responsible for the assets come to the hands of his co-executor. But where an executor possessing assets hands them over to his co-executor and they are misapplied by the co-executor, the executor who so hands them over will be answerable for their misapplication, unless he can show a good reason for having so acted(*l*). Generally an executor is liable for the *devastavit* of his co-executor, when by any act done by him any part of the estate comes to the hands of his co-executor and is misapplied by him. Again one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets and joining in acts necessary to enable him to administer. The established rule, however, is that it is the duty of all the executors to watch over, and, if necessary, to correct the conduct of each other and that if he stands by and sees a breach committed by his co-executor, he becomes responsible(*m*), (Williams on Executors, 12th Edn., pp. 1194-1199).

One executor has independently of his co-executor a full and absolute control over the estate of the testator. One executor has power to give a valid receipt for money received by him and the receipt will be binding on the co-executors and will be a sufficient discharge to the person paying the money. If, therefore, an executor join with a co-executor in a receipt he does a wanton and unnecessary act and the rule is that if executors join in giving receipts, they are all answerable for the amount of the money received though one of them may have received the moneys. In this respect the case of a trustee is different. If *trustees* join in giving a receipt and only one receives the money the other is not answerable because his joining in the discharge is necessary, one trustee not being competent to give a valid receipt(*n*).

The liability of an executor for joining in giving receipts frequently came into question before the Courts and the same has been considerably modified by later decisions. Lord Eldon in *Walker v. Symonds*(*o*), laid down as follows :—"Though one executor has joined in a receipt, yet whether he is liable shall depend on his *acting*. The former was a simple rule that *joining* should be considered as *acting*, but now *joining alone* does not impose responsibility. The distinction with respect to mere signing appears to be this—that if a receipt be given for the purpose of form, then the signing will not charge the person not receiving ; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge ; and the true question in all these cases seems to have been, whether the money was under the control of both executors "(*p*).

The rules respecting co-executors are equally applicable to co-administrators(*q*).

Liability of executor or administrator for neglect to get in any part of property.

369. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

(*j*) *In re Vickery*, (1931) 1 Ch. 572.

(*k*) *Satya Kumar v. Satya Kripal*, 10 C. L. J. 508.

(*l*) *Townsend v. Barber*, 5 Dick. 356.

(*m*) *Lincoln v. Wright*, 4 Beav. 427.

(*n*) *Ex-parte Belchier*, Amb. 219.

(*o*) 3 Sw. 68.

(*p*) *Joy v. Campbell*, 1 Sch. & Lef. 341.

(*q*) *Willand v. Fenn*, cited in *Jacomb v. Harwood*, 2 Ves. 267; *Lees v. Sanderson*, 4 Sim. 28.

Illustrations.

(i) The executor absolutely releases a debt due to the deceased from a solvent person or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

[This is sec. 328 of the Succession Act X of 1865 and sec. 147 of the Probate and Administration Act V of 1881.]

Liability of Executor or Administrator for Devastation by Negligence.—This section makes the executor or administrator personally liable for a devastavit if loss is occasioned by his improperly neglecting to call in and convert into money the estate of the deceased or in allowing the assets to remain outstanding in an improper state of investment or where loss occurs to the estate by his delay in taking proceedings against a debtor and the debtor is enabled to plead limitation or if he allows debts bearing interest to run on when he has assets in hand sufficient to discharge them or if a debt is lost by delay on the part of the executor or administrator in taking proceedings and the debtor becomes insolvent or when he fails to recover rents(r), (Williams on Executors, 12th Edn., pp. 1185-1186).

Liability of Executor to account on the footing of Wilful Default.—In an administration action there are two forms of accounts directed to be taken by the Commissioner in equity one is called "common account" and the other is called "account on the footing of wilful default." Where the decree is made for general administration the accounts usually directed to be taken by the Commissioner are :-

- (a) An account of the debts left by the deceased.
- (b) An account of the funeral expenses.
- (c) An account of the legacies left by the will of the deceased.
- (d) An account of the moveable and immoveable properties came to the hands of the executor.
- (e) An account of the costs payable out of the estate of the deceased.
(See Form N 33 of the Bombay High Court Rules at p. 249).
To this is usually added
- (f) An account of the administration of the properties come to the hands of the executors or administrators.

These are common forms of accounts. In these forms of accounts it is not necessary to adduce proof of waste, devastation or misappropriation(s). In these forms of accounts a beneficiary is not permitted to charge the executors or administrators with anything beyond his actual receipts. He cannot be allowed to show that the executor or administrator failed to get in some part of the estate of the deceased under sec. 369. But he can be charged for maladministration under sec. 368, e.g., with regard to improper payments. He may also be charged with interest if he has retained a large balance unproductive in his hands or in bank, (See Ashburner's Equity, 2nd Edn., p. 144.)

In order to obtain an account on the footing of wilful default, the beneficiary or *cestui que trust* must allege and prove at least one instance of wilful default. It must be alleged in the pleading and proved at the trial(t), (see Daniell's Chancery Practice, p. 359). The words "wilful default" imply either a consciousness of negligence or a breach of duty or a recklessness in the performance of duty(u). Wilful default is a negative breach of trust(v), whereas devastavit is a positive

(r) *Tebbs v. Carpenter*, 1 Madd. 290.

(s) *Balakbala v. Jadunath*, 57 Cal. 1858.

(t) *Mahomed v. Aishabai*, 36 Bom. L. R. 1155.

(u) *In re Vickery, Vickery v. Stephens*, (1931)

1 Ch. 572.

(v) *Shirinbai v. Sir Navroji*, 37 Bom. L. R. 946 at 952.

breach of trust. Where the judgment at the hearing did not contain a direction as to taking account on the footing of wilful default from the defendant, the plaintiff's remedy on subsequent discovery of neglect or default by the defendant was to institute another action. But this rigour of the rule is now not so strict and the modern practice is that if a *cestui que trust* has charged wilful default in his pleadings but has not obtained judgment on that footing, the Court can at any stage of the proceedings order an account to be taken on that footing if evidence of wilful default is adduced(*w*), (see Ashburner's Equity, p. 145; Daniell's Chancery Practice, p. 1018)

An account on the footing of wilful default can be taken in two ways. It may be (a) general account, *i.e.*, an account may be directed generally to be taken on the footing of wilful default even if one or two instances of wilful default are proved or (b) the Court may direct special inquiry with regard to the particular transaction in respect of which wilful default is charged.

Limitation.—Sec. 10 of the Indian Limitation Act applies to suits by *cestui que trust* against trustees when the suit is—

- (a) for the purpose of following trust property vested in trust for any specific purpose, or
- (b) for the proceeds thereof, or
- (c) for an account of such property or proceeds.

Unless, therefore, a suit falls within the class mentioned in the section it is liable to be barred by one or other of the articles in the second Schedule of the Act. To claim the benefit of sec. 10 the suit must be in relation to the property vested in the trustee for any specific purpose. If the object of the suit is not to recover any property in specie but to have an account of the general administration of the estate it must be brought within six years from the time when the plaintiff's right to demand it arose(*x*). In order that sec. 10 may apply it must be determined first whether upon the terms of the will there was a trust under which the property had become vested in the executors for a specific purpose and secondly with reference to the frame and scope of the suit whether it is to follow in the hands of the executor the property which had become vested in him for the specific purpose. If the suit is for general accounts pure and simple against an executor it cannot be treated as a suit for the purpose of following the trust property or for an account thereof. Such a suit is governed by Art. 120(*y*). It may be mentioned that the words "or for an account of such property or proceeds" were added to sec. 10 by Act IX of 1908; but that makes no difference and that only six years accounts can be required under Art. 120(*z*).

Sec. 10 does not also apply to suits for damages for breach of trust. It does not apply to suits for damages on the footing of wilful default. A claim for damages on the footing of wilful default is not one to follow the trust fund and is not saved by sec. 10. A claim for damages for breach of trust is governed by Art. 120 and the time runs from the breach and not from the date of the consequent loss(*a*). A claim for account on the footing of wilful default is governed by Act 120 and sec. 10 of the Limitation Act will not apply(*b*).

In England also claims for damages based on devastavit or for accounts on the footing of wilful default are barred after six years(*c*). The only suits that are not barred are suits charging fraud or fraudulent breach of trust by trustees.

(w) *Ayeshabai v. Ebrahim*, 32 Bom. 364.

(x) *Saroda v. Brojo Nauth*, 5 Cal. 910.

(y) *Barada Proshad v. Gajendra*, 18 C. W. N. 559.

(z) *Ayeshabai v. Ebrahim*, 32 Bom. 565; *Tholasingham v. Vedachulla*, 41 Mad. 319; *Draivellu v. Coday*, A. I. R. (1922) M. 409.

(a) *Shrinbai v. Sir Navroji Vakil*, 37 Bom. L. R. 947.

(b) *Official Trustee v. Mrs. Raiburn*, (1940) Rang. 273 at p. 314.

(c) *Lacons v. Warmall*, (1907) 2 K. B. 350; *In Re Richardson*, (1919) 2 Gh. 50; *Re Croyden*, 55 Solr. Journal 682.

PART X.

Succession Certificates.

370. (1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate :

Restriction on
grant of certificates
under this Part.

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

(2) For the purposes of this Part, "security" means—

- (a) any promissory note, debenture, stock or other security of the Central Government or of a Provincial Government ;
- (b) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India ;
- (c) any stock or debenture of, or share in, a company or other incorporated institution ;
- (d) any debenture or other security for money issued by, or on behalf of, a local authority ;
- (e) any other security which the Provincial Government may, by notification in the Official Gazette declare to be a security for the purposes of this Part.

[Clause (1) is sec. 1(4) of the Succession Certificate Act VII of 1889. The Proviso is sec. 5 of the Native Christian Administration Act. Clause 2 is sec. 3(2) of the Succession Certificate Act VII of 1889. The words "Provincial Government" in 2(e) were substituted for the words "Governor General in Council" by Government of India Adaptation of Indian Laws, order 1937.]

Certificate when Essential.

This section enacts that a Succession Certificate cannot be granted in cases where sections 212 and 213 are applicable, *i.e.*, that where the law requires probate or letters of administration to be compulsory. Sec. 212 does not apply to the cases of intestacy of Hindus, Muhammedans, Buddhists, Sikhs and Jainas or Indian Christians. Sec. 213 does not apply to cases of wills of Muhammadans, or to cases of wills of Hindus, etc., except those falling under sec. 57 clause (c). The proviso makes exception in cases of Indian Christians. Therefore a succession certificate under this Part of the Act can only be granted in the following cases:—

- (a) When the grant of probate or letters of administration is not compulsory under secs. 212 and 213.
- (b) When the deceased is an Indian Christian.
- (c) When the deceased is a Muhammedan.

- (d) When the deceased is a Hindu and has left a will, and probate of such will is not compulsory under sec. 57(d).
- (e) In cases of joint family property under Hindu law. A member of a joint Hindu family who gets the property by right of survivorship and not as an heir can apply for succession certificate in respect of shares of joint stock companies standing in the name of the deceased coparcener(e).

Object of Certificate.

The Preamble to the Succession Certificate Act VII of 1889 was as follows :—
 “Whereas it is expedient to facilitate the collection of debts on succession and afford protection to parties paying debts to the representatives of deceased person.” The object, in re-enacting this Part, is to facilitate the collection of debts and not to enable the parties to litigate questions of disputed title(f); the grant of certificate does not determine any question of title or decide what property does or does not belong to the estate of the deceased(g); it merely enables the party to whom the certificate is granted to collect any debt or security belonging to the deceased(h).

Joint Certificate.

In case where more than one person applies for certificate, a joint certificate may be granted to both, if their interests are identical(i). The grant of a joint certificate is not illegal(j). When the succession certificate is granted to two or more persons jointly and one of them dies the certificate becomes inoperative and the survivor cannot exercise the power. In such a case the certificate must be first revoked before another certificate is granted(k). There may be some inconvenience to grant a joint certificate but sec. 373(4) does not debar the issue of a joint certificate to rival claimants(l); though the Bombay High Court has held a contrary view(m). But if the interests of the claimants are not identical a joint certificate should never be granted, nor should the Court give certificate to each claimant to enable him to collect the debts according to his share, but the Judge should exercise his discretion to grant the certificate to that person who shall appear to be best entitled(n). In determining, the right of the rival claimants, the Court should not enter on the determination of intricate questions of law or of fact, but should issue a certificate to the person who has *prima facie* the clearest title to the succession and to leave the other to establish his title by a regular suit(o). It is not permissible to grant a certificate in fractions to two or more persons(p). Also, the Court should not inquire whether the debt is really due(q). It is also essential that the Court should hold some inquiry as to the right of the rival claimants to the certificate(r). In *Kalidas v. Bai Mahali*(s), the executors of the will of a Hindu, without proving the will, applied for certificate, which was opposed by the widow and the District Judge summarily rejected the application of the executors, but the High Court remanded the case. On an application for certificate if a will is set up, the Court has jurisdiction to try the question whether or not there is a will, and the Court may determine an oral will(t).

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| (d) <i>Dave v. Bai Parvati</i> , 18 Bom. 608. | (l) <i>Daw Ohon v. Daw Saw</i> , (1937) Ran. 403. |
| (e) <i>Banwari Lal v. Maksudan Lal</i> , 52 All. 252; <i>In the goods of Bai Mukand</i> , A. I. R. (1930) A. 82. | (m) <i>Lonachand v. Uttamchand</i> , 15 Bom. 684. |
| (f) <i>Prankisto v. Nobodip</i> , 8 Cal. 868. | (n) <i>Rani Raisunissa v. Rani Khujunissa</i> , 4 B. L. R. (a. c.) 149. |
| (g) <i>Gunindra v. Jugmala</i> , 30 Cal. 581; <i>Raja of Kalahasti v. Achigadu</i> , 17 M. L. J. 367. | (o) <i>Surfoji v. Kamakshiamba</i> , 7 Mad. 452; <i>Jannabai v. Hastubai</i> , 11 Bom. 179. |
| (h) <i>Wasehun Huq v. Gowhuroonissa</i> , 10 W. R. 105. | (p) <i>Abdul Gafar v. Jarayabi</i> , 31 Bom. L. R. 1093. |
| (i) <i>Narayanasami v. Kuppusami</i> , 19 Mad. 497. | (q) <i>Kashi v. Parbhu</i> , 28 Bom. 119. |
| (j) <i>Ram Raj v. Brij Nath</i> , 35 All. 470. | (r) <i>Balmakund v. Kundan</i> , 27 All. 452. |
| (k) <i>Sukumar Deb v. Bina Pani Mujumdar</i> , (1941) 2 Cal. 311. | (s) 16 Bom. 712. |
| | (t) <i>Janki v. Kalla</i> , 31 All. 236; <i>Achutan v. Cheriotti</i> , 22 Mad. 9. |

No decree will be passed against a debtor of a deceased person, unless the provisions of section 214 are complied with. If the suit is dismissed for non-compliance with the provisions of that section but if a certificate is produced before the Appeal Court, the case may be remanded(*u*). But a receiver appointed in an administration suit is not required to obtain a succession certificate to recover a debt due to the estate of which he is appointed receiver(*v*).

Sub-Section (2).

This sub-section defines the word "Security". In sub-section (1) the words "debt or security" are used. The word "debt" is to be construed according to the construction put on the same word in sec. 214. (See commentary at pp. 394-398). Hence a succession certificate "can be granted in respect of a share in the joint stock company, (*w*). But provident fund is not a debt or security(*x*).

371. The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

[This is sec. 5 of the Succession Certificate Act VII of 1889.]

Jurisdiction.—Subject to the provisions of sec. 370 a District Judge has jurisdiction to grant a certificate under the following two cases :—

(a) If the deceased at the time of his death resided within his jurisdiction. The term residence denotes the place where an individual eats, drinks and sleeps or where his family or servants eat, drink and sleep. It is not identical with ownership(*y*).

(b) If the deceased had no fixed place of residence, when he has left property within his jurisdiction. The expression "had no fixed place of residence" means has no fixed place of residence in British India(*z*). The property referred to in this section means the property belonging to the deceased. If the applicant claims the property as belonging to him, though standing in the name of the deceased, no application will lie under this section(*a*). It is in respect of assets in British India that the certificate is granted(*b*).

Grant of certificate by High Courts.—Before the passing of the Act XVIII of 1929 applications for succession certificate could not be made to the High Courts as the definition of "District Judge" in the General Clauses Act did not include a High Court Judge. By Act XVIII of 1929 "District Judge" means the Judge of a principal civil court of original jurisdiction which means a High Court Judge on its ordinary original civil jurisdiction side, and the grant of a succession certificate can now be made by High Court(*c*). As the Allahabad High Court and Nagpur

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| (u) <i>Chullan Singh v. Madho Singh</i> , 19 C. W. N. 794. | (z) <i>Amar Singh v. Sham Singh</i> , A. I. R. (1935) L. 646. |
| (v) <i>Anil Chandra v. Indian Economic Insurance Co. Ltd.</i> , (1941) 2 Cal. 221. | (a) <i>Mathura Prasad v. Shri Kedar Nath</i> , A. I. R. (1943) A. 303. |
| (w) <i>Thenappa v. Indian Overseas Bank</i> , A. I. R. (1943) M. 743; 13 Com. Cas. 202. | (b) <i>Mir Ibrahim v. Ziaulnissa</i> , 12 Bom. 150. |
| (x) <i>Assam Bengal Railway v. Atul Chandra</i> , 65 C. L. J. 259; 41 C. W. N. 524; A. I. R. (1937) C. 314. | (c) <i>In re Kuppaswami Nayagar</i> , 53 Mad. 237; <i>In re Lakshmidas Bhanji</i> , (Bombay Law Journal, Sept. 1930, p. 192); <i>In the goods of Bholanath Pal</i> , 58 Cal. 801; <i>Re Estate of Aroonachellam</i> , 9 Rang. 205. |
| (y) <i>Kumud v. Rai Jatindra</i> , 18 C. L. J. 221. | |

High Court do not possess original civil jurisdiction they cannot grant a succession certificate(d).

372. (1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely :—

Application for certificate.

- (a) the time of the death of the deceased ;
- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits ;
- (c) the family or other near relatives of the deceased and their respective residences ;
- (d) the right in which the petitioner claims ;
- (e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted ; and
- (f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.

[This is sec. 6 of the Succession Certificate Act VII of 1889. Clause (3) is added by Act XIV of 1928.]

Who can apply for Certificate.—Any person of sound mind and not a minor can apply for a certificate, provided he has an interest in the estate of the deceased. The Secretary of State for India may apply for grant of certificate(e). The only right which entitles a person to a succession certificate is the beneficial interest in the debt or security. It is open to any one who has a beneficial interest to apply for it (e¹).

Grant of Succession Certificate on behalf of Minors.—When a succession certificate is to be granted to a minor, it is generally granted to a guardian of the minor. In *Ram Kuar v. Sardar Singh*(f) it was held that a certificate may be

- (d) *In the goods of Rajendra*, 57 All. 802 ; A. I. R. (1934) A. 758 ; (1934) A. L. J. 800 ; *In re Vishnu Murlidhar*, A. I. R. (1944) N. 273.
- (e¹) *In the Estate of C. V. Nayagan*, A. I. R. (1936) R. 466.
- (f) *Ram Kuar v. Sardar Singh*, 20 All. 352.
- (e) *In the goods of Bholanath Pal*, 58 Cal. 801.

granted to a minor through his next friend. In *Krishnama v. Venkata(g)* also it was held that succession certificate may be granted to a minor on an application made by his natural guardian. But this decision has not been followed by the Bombay High Court. Beaumont C. J. has held in *In re Narayan Khanderao(h)* that the succession certificate can be granted to the guardian of the minor if such guardian is appointed guardian of the property of the minor under the Guardian and Wards Act. His Lordship came to this conclusion because of the practice of the Bombay High Court and on the authority of *Gulabchand v. Moti(i)*. So far as the practice is concerned it may or may not be correct. Rule 631 of the Bombay High Court rules does not justify any such practice. On the contrary it provides for the execution of a bond with justifying surety in case of an application for the grant of a succession certificate for the use and benefit of a minor to be given to the applicant, if the applicant is not a guardian of the property of such minor appointed by the Court. By that rule justifying surety is not required from the guardian of the property of the minor appointed by Court but is required from any other person. So far as the decision in 35 Bom. L. R. is based on 25 Bom. 523 the same is also, it is submitted, not warranted by the facts of that case. The only point which Sir Lawrence Jenkin C. J. decided in 25 Bom. 523 was that the certificate should not be issued to the guardian of the minor without requiring him to give security. In that case the District Judge had granted a certificate to the applicant as guardian of the minor (and he was not a guardian of the property of the minor appointed by Court) without his giving any security, which was obviously improper.

Sec. 223 of the Indian Succession Act mentions that probate cannot be granted to a person who is a minor and sec. 236 mentioned that letters of administration cannot be granted to a minor. It is nowhere enacted in Part X of the Indian Succession Act that a succession certificate shall not be granted to a minor. What is required from the applicant is security under sec. 375 and the interest of the minor is safeguarded by sec. 375. These sections do not appear to have been brought to the notice of the Court when the decision in 35 Bom. L.R. was given.

The question was considered in the Bombay High Court by Engineer J., in *Re Inherent Jurisdiction* and in *re Administrator General's Act III* of 1913, and *In re the estate of Francisco Fernandes* of Bombay Christian Inhabitant at the time of death residing at Mazagaon, without the fort of Bombay, deceased. Rosa Maria D'Silva, widow... Petitioner, when his Lordship declared the following judgment on 1st July 1938 (in chambers).

"This is an application filed by the petitioner that she may be authorised to apply for and obtain from the Administrator General of Bombay a certificate under section 31 of the Administrator General's Act entitling her to receive the sum of Rs. 1,016-6-0 from the Indian Life Assurance Coy. Ltd. The application is made under the inherent jurisdiction of the Court.

One Francisco Fernandes died in 1937 leaving a widow and a minor daughter. The widow died about a year later leaving the said minor daughter. The deceased Fernandes left a policy under which the aforesaid sum is payable to his legal representative, and the present application is made by the mother of the deceased Fernandes as the grand-mother and natural guardian of the minor for an order authorising her to apply to the Administrator General for a certificate under section 31 of the Administrator General's Act.

Section 246 of the Indian Succession Act provides for 'Letters of Administration being granted to a person for the use and benefit of a minor or a lunatic until he

(g) *Krishnama v. Venkata*, 36 Mad. 314; (h) 35 Bom. L. R. 950.
 (i) *In the goods of Sannarain Mohata*, 21 Cal. (i) 3 Bom. L. R. 795; 25 Bom. 523.
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attains majority or becomes of sound mind. There was no such provision either in the Succession Certificate Act VII of 1889, or in the corresponding sections now incorporated in the Indian Succession Act; nor is there any such provision in the Administrator General's Act.

The question whether a natural guardian is entitled to take out a succession certificate for the benefit of a minor has been considered by this Court in at least three decisions. In I.L.R. 25 Bom., p. 523, Sir Lawrence Jenkins and Mr. Justice Ranade, held that an application by a guardian of a minor was not contemplated by sec. 6, clause (d) of Act VII of 1889 (Succession Certificate Act), which only permits a petitioner, who claims the right for himself, to apply. Section 6(d) of the Succession Certificate Act and the corresponding provision relating to succession certificates in the present Indian Succession Act is to the effect that the application for a certificate must set forth, among other things, the right in which the petitioner claims.

In *Ex-parte Mahadev Gangadhar(j)* the Appeal Court consisting of Sir Lawrence Jenkins and Mr. Justice Batty pointed out that a minor cannot apply for an order for a succession certificate, but that a person who has been appointed guardian of the property of the minor can so apply. The reason of the decision was that a legal guardian has the obligation cast upon him of dealing with the property of a ward as carefully as a man of ordinary prudence would deal with his own, and he may do all acts which are reasonable and proper for the realization, protection or benefit of the minor's property, and that, therefore, the requirement that the petitioner should set forth the right under which he claims is satisfied, if the petitioner is appointed guardian of the property of the minor.

In 35 Bom. L. R. p. 350 the Appeal Court consisting of Sir John Beaumont, Chief Justice and Mr. Justice Rangnekar, held that a succession certificate cannot be granted to a natural guardian but should only be granted where a guardian has been appointed guardian of the property under the Guardians and Wards Act.

There are no decisions with reference to the Administrator General's Act, but the provisions of that Act correspond to the provisions of the Succession Certificate Act. Under the Administrator General's Act also the petitioner is required to set forth the right in which he claims a certificate. In my opinion the same principles are applicable to cases under the Administrator General's Act.

In the case of succession certificates there is a provision requiring security from the petitioner, and it may, therefore, be unnecessary to require security before appointing the petitioner guardian of the property of the minor, if the only property of the minor consists of the estate to be recovered under the succession certificate. In the Administrator General's Act there is no provision requiring security, and the Court should, therefore, consider, before appointing a person guardian of the property of the minor with authority to apply for Administrator General's Certificate to recover property devolving on a minor, whether security should be taken or not.

The present application must, therefore, be refused, notwithstanding certain precedents to which my attention was drawn. The petitioner, if she wants to apply for a certificate under the Administrator General's Act, should get herself appointed guardian of the property of the minor with authority to apply for a certificate under the Administrator General's Act".

The Court will refuse to grant the certificate when the minor is about to attain majority(k).

Contents of the Petition.—This section is similar to sec. 276 as regards the contents of the petition for probate or letters of administration. The petitioner must give the following particulars :—

- (a) Date of the death of the deceased.
- (b) Place of residence of the deceased or if the residence is not within the jurisdiction, the property of the deceased within the jurisdiction of the District Judge.
- (c) Next-of-kin of the deceased.
- (d) The right of the petitioner. The applicant must show some title or interest in the debt or security in respect of which he has applied for the certificate. If two or more persons apply, the Court must decide who has the preferential claim^(l).
- (e) The absence of any impediment under sec. 370 of this Act. The petition should state that there is no impediment to the grant of certificate.
- (f) The debt or security in respect of which the certificate is applied for. A certificate can be issued only in respect of the debts and securities mentioned in the application but it may be extended to other debts not so mentioned^(m).

Sub-sec. (3).

Before the amendment was made in this sub-sec. by Act XIV of 1928 the decisions of the Courts were conflicting as to whether a certificate could be granted of a part of the debt. This conflict is now set at rest. A certificate can now be granted of a part of the debt.

373. (1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

- (a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and
- (b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too

(l) *Ashgar v. Abdul*, 15 Cal. 574; *Krishna v. Secretary of State*, 35 Cal. 681. (m) *Sundarammal v. Kullappa*, 5 M. L. J. 36.

intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

[This is sec. 7 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge."]

Procedure.—This section lays down the procedure to be followed on the petition being filed, (see sec. 288). It differs from the procedure laid down for the grant of probate. If the application is to be opposed by any person, a caveat is not to be filed, but the procedure laid down in this section is to be followed.

*"Decide in a summary manner the right
to the certificate."*

The procedure laid down by this section is a summary procedure. The enquiry must be summary. If there has been no inquiry, the order will be set aside(n). In granting the certificate it is not the function of the Court to see whether the applicant has a valid title to the debt or not or whether the assignment of the debt in favour of the applicant conveyed any title to the applicant or whether the debt secured by promissory note was recoverable or not. It requires the Judge not to decide upon the contest whether the particular debts included in the application were really due at all or were really due to the deceased but to satisfy himself that there is ground for entertaining the application. After the notice is issued as provided in sub-sec. (1) the only issue which the Court should try should be confined to "the right to the certificate" and whether the applicant was the representative of the person to whom the debt was alleged to be due(o). The Court should hold a short inquiry resulting in a rapid decision on the only question whether the applicant has an interest in the estate of the deceased, the extent of his interest and his fitness(p); it is not the function of the Court to inquire into the existence or non-existence of the debt(q). If objection is taken on the ground that the debt in respect of which the certificate is applied for belongs to the joint family, it is not proper for the Court to issue the certificate without making any inquiry at all(r). If objection is taken that there is a will of the deceased the Court should inquire into the existence or non-existence of the will and the terms thereof(s). But the Court has no jurisdiction to construe the will in order to decide who were the persons beneficially interested in the estate. All that the Judge has jurisdiction to decide is who are the proper persons to be granted the certificate. In determining that point he might have to consider who for instance were the persons best entitled to call for administration and who were the heirs(t).

The decision of the District Judge under this section on summary inquiry does not in any way bar the right of the parties nor does it establish the right of the party to the debt to collect which the certificate is granted(u), (see sec. 387).

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| (n) <i>Hurri Krishna v. Balabhadra</i> , 23 Cal. 431. | (q) <i>Kashi v. Parbhu</i> , 28 Bom. 119. |
| (o) <i>Brojendrasundar v. Niladrinath</i> , 57 Cal. 814 at p. 828 (F. B.). | (r) <i>Balmakund v. Kundan</i> , 27 All. 452 ; |
| <i>Sivamma v. Subbamma</i> , 17 Mad. 477 ; <i>Radhika v. Secretary of State</i> , 38 All. 438 | <i>Dharmaya v. Sayana</i> , 21 Bom. 53. |
| (p) <i>Gulabchand v. Moti</i> , 25 Bom. 523 ; <i>Abdul Gafur v. Jayarabi</i> , 31 Bom. L. R. 1093. | (s) <i>Janki v. Kalu</i> , 31 All. 286. |
| | (t) <i>Abdul Gafur v. Jayarabi</i> , 31 Bom. L. R. 1093. |
| | (u) <i>Musst. Jigri v. Syed Ali</i> , 5 C. W. N. 494. |

Sub-Sec. (3).

This sub-sec. further provides that even if the issues as to the right of the rival applicants are difficult to decide in a summary manner, the District Judge should nevertheless grant the certificate to the party who shows *prima facie* the best title. The Judge should not refuse to grant the certificate and ask the parties to litigate between them as to their respective rights(v). But the Court should grant the certificate to the person who has a *prima facie* title and to leave the other person to establish his right by a regular suit(w).

Sub-Sec. (4).

This sub-section is confined to cases whether there are more applicants than one for a certificate. It lays down that when there are more applicants than one for the certificate, the Judge should grant it to the one who has a larger interest and is otherwise a fit person(x). As a rule a certificate should not be granted to several persons jointly because it is inconvenient. But if such a certificate is granted there is nothing illegal in granting it(y). The word "may" in this sub-sec. gives an absolute discretion to the Judge which person to select. In *Basunta v. Parbati*(z) an application for a certificate made by the daughter of the deceased was opposed by his nephew on the ground that the deceased was a member of the joint family. The District Judge granted the certificate to the daughter without going into the question of jointness. It was held on appeal that it was the duty of the District Judge to go into the question of jointness.

Limitation :—There is no period of limitation for an application for a succession certificate(a).

374. When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

- (a) to receive interest or dividends on, or
- (b) to negotiate or transfer, or
- (c) both to receive interest or dividends on, and to negotiate or transfer,

the securities or any of them.

[This is sec. 8 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge."]

Contents of Certificate.—This section lays down what should be contained in the grant of certificate. (See Form Schedule VIII and sec. 377).

- (a) If the certificate is granted to recover debt, it must specify the debt and the person from whom the debt is due. If there is any interest running on such debt, it must specify the rate of interest and the time from which interest runs. The certificate should also empower the person to recover such debt and interest(b).
- (b) If the certificate is granted in respect of some securities, it must specify the nature of the security and its face value, and must

(v) *Sivamma v. Subbamma*, 17 Mad. 477; *Kalidas v. Bai Mahali*, 16 Bom. 712.

(w) *Surfogi v. Kamakshiamba*, 7 Mad. 543.

(x) *Mt. Jagtaran v. Mt. Gaitri Devi*, A. I. R. (1936) Pat. 430; 163 I. C. 861.

(y) *Daw Chu v. Dinshaw*, (1937) Rang. 403; A. I. R. (1937) R. 836.

(z) 81 Cal. 133.

Janki v. Kesavalu, 8 Mad. 207.

(b) *Jai Dei v. Banwari Lal*, 35 All. 240.

empower the person to whom it is granted either to receive interest or dividend, or to sell and negotiate, or to do both.

375. (1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

[This is sec. 9 of the Succession Certificate Act VII of 1889 with the alteration of the expression "District Court" into "District Judge."]

Sub-sec. (1).

When security may be required from the widow of a Hindu who takes a limited interest :—In *Jai Dei v. Banwari Lal*(c) it was held that there might be special circumstances requiring a Hindu widow to give security. In *Narain Dei v. Mt. Parmeshwari*(d), it was held that security should not be taken from a Hindu widow of a separate Hindu in the absence of special circumstances rendering the taking of security necessary. In *Mt. Kausilla v. Sukhdei*(e) it was observed that "in the ordinary way a Hindu widow ought not to be called upon to give security at all. No doubt there are many reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest, and to assume everything against the widow." The Patna High Court agrees with this view(f). The Madras High Court also expressed its agreement with the view by the Allahabad and Patna High Courts(g) and in *Swarajya Lakshmi v. Anantha Padmanabha*(h), held that a widow applying for succession certificate in respect of a sum of money due to her husband ought not to be called upon to give security at all.

Administration Bond.—Under this section the taking of an administration bond is compulsory in two cases :—

- (a) Under sec. 373(3) when the Judge cannot decide in a summary manner intricate questions of law or fact and makes the grant to the person showing a *prima facie* title. Such person must execute a bond with justifying surety or other sufficient security.
- (b) Under sec. 373(4) when there are more applicants than one for the grant of certificate.

(c) 85 All. 249.

(d) 40 All. 81.

(e) A. I. R. (1928) A. 579.

(f) *Badri Narain v. Lachminia*, A. I. R.

(1935) Pat. 10.

(g) *Lingamma v. Venkayya*, A. I. R. (1944) M. 374.

(h) A. I. R. (1945) M. 505.

In these two cases no discretion is left to the Court to dispense with the bond(*h*¹).

In other cases the taking of an administration bond is discretionary.

Nature of Security.—Sub-sec. (1) makes it a condition precedent on the Judge to take security before making the grant. The security to be taken is the execution of a bond with one or more sureties or any other sufficient security. The order requiring security must specify the amount of security and the term with which the same should be furnished(*i*).

Sub-sec. (2).

Assignment of Bond.— This sub-sec. is in terms similar to sec. 292 and for commentary see p. 493.

376. (1) A District Judge may, on the application of the holder of a certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate.

[This is sec. 10 of the Succession Certificate Act VII of 1889 with the alteration of the expression " District Court " into " District Judge."]

Under this section the Court can extend the certificate on the application of the holder of the certificate, it has no jurisdiction to grant extension to a person who is not the holder of the certificate(*j*).

The extension of a certificate under this section to additional debt is not the grant of a certificate so as to give a right of appeal under sec. 381(*k*). An order refusing an application to extend the certificate to any debt not specified is appealable(*l*).

Forms of certificate and extended certificate.

377. Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

[This is sec. 11 of the Succession Certificate Act VII of 1889.]

378. Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge

Amendment of certificate in respect of powers as to securities.

(*h*¹) *Jai Dei v. Banwari*, 35 All. 249

(*i*) *Gulraji v. Jugdeo*, 28 All. 477.

(*j*) *Rajah of Kalahasti v. Rama*, 19 M. L. J. 456.

(*k*) *Venkateswarulu v. Brahmaravutu*, 25 Mad. 634.

(*l*) *Radha v. Gopal*, 27 C. W. N. 947.

may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

[This is sec. 12 of the *Succession Certificate Act VII of 1889* with the alteration of the expression "*District Court*" into "*District Judge*."]]

Amendment of Certificate.—This section empowers the District Judge to amend the certificate with respect to security specified in the certificate. Amendment of certificate in respect of debt is not mentioned, but in respect of any clerical error or the date of any debt due, the Court has inherent power to do so. Thus the Court can amend a certificate in order to correct a misdescription of a debt but not to substitute one kind of debt for another(m).

The power to amend the certificate in respect of the security conferred by this section is to be exercised with caution and for the benefit of the estate only ; if no just cause is shown the Court may refuse to extend.

379. (1) Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for.

Mode of collecting Court-fees on certificates.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

[This is sec. 14 of the *Succession Certificate Act VII of 1889*.]

An application of certificate must be accompanied by a deposit of Court-fee and on the death of the holder of the certificate, if a fresh application is made, the Court-fee has to be paid over again(n). The deposit is to be made along with the application for certificate and the amount of deposit is equal to the court-fees payable for the certificate(o) and the Court-fee payable is on the total value of the debt or security mentioned in the certificate(o¹).

Refund of Deposit.—If the application is granted the sum deposited cannot be refunded ; but if no order for grant is made, a refund may be made(p). But this case is dissented from in *Prakash Wati v. Province of Punjab*(q).

Local extent of certificate.

380. A certificate under this Part shall have effect throughout the whole of British India.

This section shall apply in British India after the separation of Burma and Aden from India to certificates granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

(m) *Sunder Singh v. Karam Singh*, 110 I. C. 479.

(n) *In re Saroje Bashini*, 20 C. W. N. 1125.

(o) *Gurcharan v. Secretary of State*, 58 All. 752.

(o¹) *In re Sunderji Laljee*, 48 Bom. L. R. 498.

(p) *Sankara v. Nainar*, 21 Mad. 241.

(q) 23 Lah. 74 ; A. I. R. (1941) L. 399 (See also *In re Fatmabai*, A. I. R. (1940) Nag. 65 where refund was allowed).

[This is sec. 15 of the Succession Certificate Act VII of 1889. The second Clause was inserted a. per Government of India (adaptation of Indian Laws) order, 1937.]

381. Subject to the provisions of this Part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

[This is sec. 16 of the Succession Certificate Act VII of 1889.]

Effect of Certificate.—The effect of the certificate is to afford protection to the parties paying the debts. The question whether the debt belonged to the deceased is not a matter to be decided on an application for a succession certificate^(r). The same question recently arose in the Bombay High Court relating to the right of a person, who had a legal title to the shares of a company, to have the shares registered in his name. It was decided by Mr. Justice Bavdekar and Mr. Justice Dixit at the Bombay High Court in an appeal filed by Seth Ramchandraprasad Balbhadraprasad against the Gujarat Cotton Mills Co., Ltd., from an order of the District Judge of Ahmedabad. The appellant's father died in September, 1944. At the time of his death 5,077 shares of the Gujarat Cotton Mills Co., Ltd., were standing in his name. The appellant obtained a succession certificate in respect of those shares and applied to the Company to have his name entered on the register of shareholders of the Company. The Company refused to do so because the managing agents of the Company claimed the shares as beneficial owners thereof alleging that the shares were allowed to stand nominally in the name of the appellant's father as a partner in the managing agency firm. The appellant, therefore, asked for rectification of the register of the Company.

Allowing the appeal, Their Lordships held that under Section 88 of the Companies Act, the Court was not concerned with the question as to who was the beneficial owner of the shares, but with the question as to who was legally entitled to the shares. The appellant had established by the production of the succession certificate that he was the legal owner of the share. Their Lordships, therefore, ordered the Company to rectify the register by entering the appellant's name as the holder of the shares in question. (Reported in *Times of India* dated 2-4-46.)

In the case of securities a succession certificate enables the grantee to transfer the security(s). Even if the article of association of the company provide that the executor or administrator of a deceased member shall be the only person recognised by the company, a transfer by a person to whom the succession certificate is granted is to be recognised as the legal representative of the deceased.

It affords a full indemnity to the persons liable to pay the debts and in respect of the securities covered by the certificate to those who pay the same in "good faith"^(t). The expression "good faith" is defined in the General Clauses Act. Even if payment is made without due care and caution still if it is honestly paid, it will be payment in good faith. It affords full indemnity to the banks under the

(r) *Srinivasa v. Gopalan*, 26 M. L. J. 365; 28 I. C. 424.

R. (1948) M. 743.

(s) *Thenappa v. Indian Overseas Bank*, A. I.

(t) *Ex-parte Rau Narsinga*, 2 M. H. C. R. 164.

Presidency Banks Act(u): If any one refuses to pay the debts to the holder of the certificate, he will become liable to pay interest(v). It entitled the holder to institute a suit to recover the debt.

But the certificate is only conclusive of the representative title of the holder thereof as against the debtor(w). A suit will not lie for the declaration that the holder of the certificate is not the legal representative of the deceased(x). Until the certificate is revoked under sec. 383, it is good as regards the representative title of the holder. Even in the case of a minor if the certificate is granted to the guardian of the minor it will afford indemnity to the debtor concerned and the certificate does not terminate on the minor attaining majority(y).

But the certificate is not conclusive as to the proof of the debt mentioned therein(z) nor has it the effect of adjudicating the right of the person to the debt or security(a). The receipt of the money under the certificate does not give any title or right to the money(b).

The right conferred on the holder of the certificate is personal to the grantee and cannot be assigned(c).

382. Where a certificate in the form, as nearly as circumstances admit, of Schedule VIII has been granted to a resident within a Foreign State by the British representative accredited to the State, or where a certificate so granted has been extended in such form by such representative, the certificate shall, when stamped in accordance with the provisions of the Court-fees Act, 1870, with respect to certificates under this Part, have the same effect in British India as a certificate is granted or extended under this Part.

[This is sec. 17 of the *Succession Certificate Act VII of 1889*.]

By the Baroda Cantonment (Application of Laws) Order 43 this Act is made applicable to the Baroda Cantonment but for sec. 382 the following section is substituted.

“Where a certificate in the form of Schedule VIII has been granted under the provisions of this Act by a Court having jurisdiction under the Act in British India or under the Act as applied in any area outside British India which is under the administration of the Crown Representative or where a certificate in the form as nearly as circumstances admit, of the said schedule has been granted to a resident within a foreign state by the British representative accredited to that state or where a certificate so granted has been extended in such form by such Court or by such representative, the certificate shall, if it has been stamped in accordance with the law in force in the Baroda Cantonment, have the same effect as a certificate granted or extended under this Act.” By the Crown Representative Order (Foreign Jurisdiction Order in Council, 1937) published by notification in the Gazette of India. 16th September, 1939 Part I-A at p. 171 this Act is made applicable to the “Punjab States Railway Lands” as follows:—“For sec. 382 substitute

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| (u) <i>Ranjitsinghji v. The Bank of Bombay</i> , 45 Bom. 138. | (y) <i>Ganpaya v. Krishnappa</i> , 26 Bom. L. R. 491. |
| (v) <i>Oriental Government Security Ltd. v. Venettedu</i> , 35 Mad. 162. | (z) <i>Mahomed v. Sharifan</i> , 15 C. L. J. 384. |
| (w) <i>Wasselun Huq v. Gowhuroonissa</i> , 10 W. R. 105; <i>Azmat Ali v. Silla Bux</i> , 9 A. L. J. 766; <i>Rupan Bibi v. Bhagelu Lal</i> , 36 All. 423. | (a) <i>Guntindra v. Jugmala</i> , 30 Cal. 581; <i>Wasselun Huq v. Gowhuroonissa (supra)</i> . |
| (x) <i>Gauri v. Gayadin</i> , 4 All. 355. | (b) <i>Jigri Begum v. Syed Ali</i> , 5 C. W. N. 494. |
| | (c) <i>Allah Dad v. Sant Ram</i> , 35 All. 74; <i>Rang Lal v. Anunial</i> , 36 All. 21. |

Where a certificate in the form of the Eighth Schedule to this Act has been granted by a Court having jurisdiction under the Act in British India or under the Act as applied in any area outside British India which is under the administration of the Crown Representative or where a certificate has been granted to a subject of, or resident within a foreign state in the Agency by a Political Agent on the production by such subject or resident of a certificate granted to him by a state Court ; or where a certificate so granted has been extended, the certificate shall if it has been stamped in accordance with the provisions of the Court Fees Act, 1870 have the same effect as certificate granted or extended under this Act.

Grant by British Representatives.—This section enacts that a certificate granted by the Political Agent of a Native State should be recognised by the Civil Courts in British India. A District Judge cannot treat the certificate as invalid, because of irregularity in procedure in the grant by the Political Agent. These irregularities may be a reason for the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity(d). A grant of probate by a Native State and a production of a certified copy thereof certified by the Political Agent is not sufficient(e).

383. A certificate granted under this Part may be revoked for any of the following causes, namely ;

- Revocation of certificate.
- (a) that the proceedings to obtain the certificate were defective in substance;
 - (b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case ;
 - (c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently ;
 - (d) that the certificate has become useless and inoperative through circumstances ;
 - (e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

[This is sec. 18 of the Succession Certificate Act VII of 1889.]

Revocation of certificate.—The causes (a) to (d) enumerated in this section for revocation of the certificate are similar to the causes enumerated in section 263 for the revocation of grant of probate or letters of administration and for detailed commentary, see pp. 454-457. Clause (e) is newly inserted. If a certificate is granted by a District Judge under a mistake of fact, it may be revoked. The application for revocation must be made by some person having an interest in the revocation(f). No suit will lie to set aside the certificate on the ground that the certificate was obtained by the use of false evidence(g). If the certificate is

(d) *Annappurnabai v. Lakshman*, 19 Bom. 145; *Annappurni v. Krishna*, 16 Mad. 405.
 (e) *Manasing v. Amad Kunhi*, 17 Mad. 14.

(f) *Mancharam v. Kalidas*, 19 Bom. 821.
 (g) *Rupan Bibi v. Bhagelu Lal*, 36 All. 428.

obtained by suppression of will it is not necessary for the applicant to obtain probate of the will if the will comes under sec. 57 (c)(h).

The application for revocation should be made to the Court which granted the certificate. That is implied by sec. 389(i).

384. (1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.

[This is sec. 19 of the Succession Certificate Act VII of 1889.]

Appeal.—An appeal shall lie to the High Court from an order of the District Judge granting, refusing or revoking a certificate(j) but not from an order refusing to revoke a certificate already granted(k). In the last case the appeal was treated as a revision application and the Court fees paid were refunded. The extension of a certificate under sec. 376 to additional debt is not an order “granting a certificate,” and no appeal lies(l). But an order refusing an extension is appealable(m). As to whether an appeal will lie from an order granting certificate conditional on security being given under sec. 375, the decisions are conflicting. In the under-mentioned cases it was held that an order made under sec. 375, granting certificate conditional on the applicant giving security was not appealable(n).

In the following cases it was held that an appeal would lie(o). The Bombay High Court has held that an order granting a certificate accompanied by a condition that security should be furnished is appealable(p); but an order directing that a certificate should not be granted unless security is furnished is not appealable. In the case of *Bindo v. Radhe Lal*(q), a certificate was granted *ex-parte* to the widow of the deceased; subsequently the brother of the deceased appealed and contended that no notice was given to him of the widow's application and he preferred an

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| (h) <i>Musst. Janki Bai v. Durga Prasad</i> , A. I. R. (1938) A. 640. | (n) <i>In re Srimati</i> , 3 All 304; <i>Bhagwanni v. Manni Lal</i> , 13 All. 214; <i>Nanuhu v. Gulabo</i> , 26 All. 173; <i>Bai Devkore v. Lalchand</i> , 19 Bom. 790; <i>Ramma Reddi v. Papi Reddi</i> , 19 Mad. 199; <i>Rajamma v. Ramakrishnayya</i> , 29 Mad. 121; <i>Chitbarekha v. Babu</i> , 10 Pat. 385. |
| (i) <i>Sukhtia Bawa v. Secretary of State</i> , 19 C. W. N. 551. | (o) <i>Ariya v. Thangammal</i> , 20 Mad. 442; <i>Radha Rani v. Brindaban</i> , 25 Cal. 320. |
| (j) <i>Mancharam v. Kalidas</i> , 19 Bom. 821; <i>Lazarus v. Mangla</i> , 25 Pat. 254. | (p) <i>Bai Nandkore v. Sha Maganlal</i> , 36 Bom. 272. |
| (k) <i>Rura Mal v. Parmeshari</i> , (1938) Ind. Rul. 360; <i>Ahmed v. Govt. of Bombay</i> , 44 Bom. L. R. 912. | (q) 42 All. 512. |
| (l) <i>Venkateswarulu v. Brahmawulu</i> , 25 Mad. 684. | |
| (m) <i>Radha Raman v. Gopal</i> , 27 C. W. N. 947. | |

appeal from the order granting the certificate. It was contended on behalf of the widow that no appeal lay and that the appellant should first apply for revocation of the grant. It was held that it was not necessary to file an application for revocation and that the appeal was proper.

No appeal lies against an order as to security on the ground that the security is inadequate(r).

Second Appeal.—There is no scope for second appeal under this section(s).

385. Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

Effect on certificate of previous certificate, probate or letters of administration.

[This is sec. 20 of the Succession Certificate Act VII of 1889.]

Invalidity of the Certificate.—A certificate granted under this part is invalid in the following cases :—

- (a) If a certificate in respect of the same debt has already been previously granted.
- (b) If a probate has been previously granted and is in force. It is not competent for the Court to go into the question whether the probate fulfilled certain requirements or to hold that the deceased was not competent legally to make the will of which probate has been granted(t).
- (c) If letters of administration have been previously granted and are in force.

As to the effect of payments made under a certificate which is invalid, they stand on the same footing as payments made under a void grant of probate or letters (see p. 399 and pp. 498-499 *supra*). See also sec. 386, which validates payment in ignorance under an invalid or superseded certificate.

386. Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate.

Validation of certain payments made in good faith to holder of invalid certificate.

[This is sec. 22 of the Succession Certificate Act VII of 1889.]

This section is similar to sec. 215 (Proviso). If a certificate is revoked under sec. 383 or on appeal under sec. 384 or by reason of a certificate already granted or for any other cause the payments made to the holder will discharge the debtor,

- (r) *Lucas v. Lucas*, 20. Cal. 245; see also, (t) *Hari Chand v. Hargopal*, A. I. R. (1930) 1 Cal. 127.
 (s) *Subba Rao v. Palaniandi*, 17 Mad. 167.

provided he has no notice of the invalidity or supersession of the certificate and acts in good faith(u).

387. No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

[This is sec. 25 of the Succession Certificate Act VII of 1889.]

As seen in sec. 373, the inquiry is summary. Therefore, an aggrieved party has his remedy in a civil action to establish his right to the debt or security under this section. The grant of certificate does not establish the title of the grantee to such debt or security. No decision on summary inquiry upon the question of the right of the party will bar the claim of the party entitled to the debt or security(v).

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act.

388. (1) The Provincial Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge :

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of

(u) *Paramandachary v. Veerappan*, A. I. R. (1928) M. 213. (v) *Murli Das v. Achut Das*, 5 Lah. 105.

them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge.

[This is sec. 26 of the Succession Certificate Act VII of 1889. The word "Provincial" is substituted for the word "Local" per Government of India (adaptation of Indian Laws) order, 1937.]

This section empowers any Provincial Government to invest any Court inferior in grade to the District Court to exercise the functions of the District Judge under this Part. When so invested the inferior court has concurrent jurisdiction with the District Court.

This section confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred on the High Court under sec. 384 over the order of a District Court. There is no provision for second appeal(w).

As to the powers conferred on the Subordinate Judge, he has all the powers of the District Judge he has jurisdiction to hear and determine an application under section 2 of Regulation VIII of 1827(x). If a certificate is granted by the Subordinate Judge its revocation must be made before him and not to the District Judge(y).

The proviso to sub-sec. (2) does not apply if there is no notification by Provincial Government(z).

389. (1) When a certificate under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

Surrender of superseded and invalid certificates.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

[This is sec. 27 of the Succession Certificate Act VII of 1889.]

This section is similar to sec. 296 for surrender of revoked grants.

390. Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of section 370, sub-section (2), section 372, sub-section (1), clause (f), and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect

Provisions with respect to certificates under Bombay Regulation VIII of 1827.

(w) *Subba Rao v. Palaniandi*, 17 Mad. 167.

554.

(x) *Pitambar v. Ishwar*, 17 Bom. 230.

(z) *Rama v. Parkasha*, A. I. R. (1939) Pesh.

(y) *Sukhia v. Secretary of State*, 19 C. W. N.

30.

to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

[This is sec. 28 of the Succession Certificate Act VII of 1889.]

This section provides that secs. 388 and 384 apply to all orders made under Chapter II of the Bombay Regulation VIII of 1827. Whether the certificates referred to in this section apply to all orders under Chapter I of the Regulation was raised but not decided in (*Rajrajishwarashram v. Swarajanandtirtha*(a)). The Bombay Regulation VIII of 1827 was declared by Laws Local Extent Act, 1874 (Act XV of 1874) sec. 5 to be in force in the whole Province of Bombay except as regards the Scheduled Districts. The grant made under this Act supersedes the grant under the Regulation, (see sec. 215).

An appeal lies from an order refusing to grant a certificate of heirship under Reg. VIII of 1827(b).

(a) 29 Bom. L. R. 1081.

(b) *Rangubai v. Abaji*, 19 Bom. 399; *Javer-*

mal v. The Nazir of the District Court of Poona, 18 Bom. 748.

PART XI.**Miscellaneous.**

Savings **391.** Nothing in Part VIII, Part IX or Part X shall—

- (i) validate any testamentary disposition which would otherwise have been invalid ;
- (ii) invalidate any such disposition which would otherwise have been valid ;
- (iii) deprive any person of any right of maintenance to which he would otherwise have been entitled ; or
- (iv) affect the Administrator General's Act, 1913.

[This is sec 149 of the Probate and Administration Act V of 1881]

392. (*Repeals*') Repealed by Act XII of 1927.

This section as also schedule IX have been repealed by Act XII of 1927. (Repealing Act).

Act XII of 1927 was repealed by Act XVIII of 1928, Sch. 2. (Repealing and Amending Act).

Act XVIII of 1928 was repealed by Act VIII of 1930, Sch. 2.

Act VIII of 1930 was repealed by Act XXIV of 1934, Sch. 2. (Repealing and Amending Act).

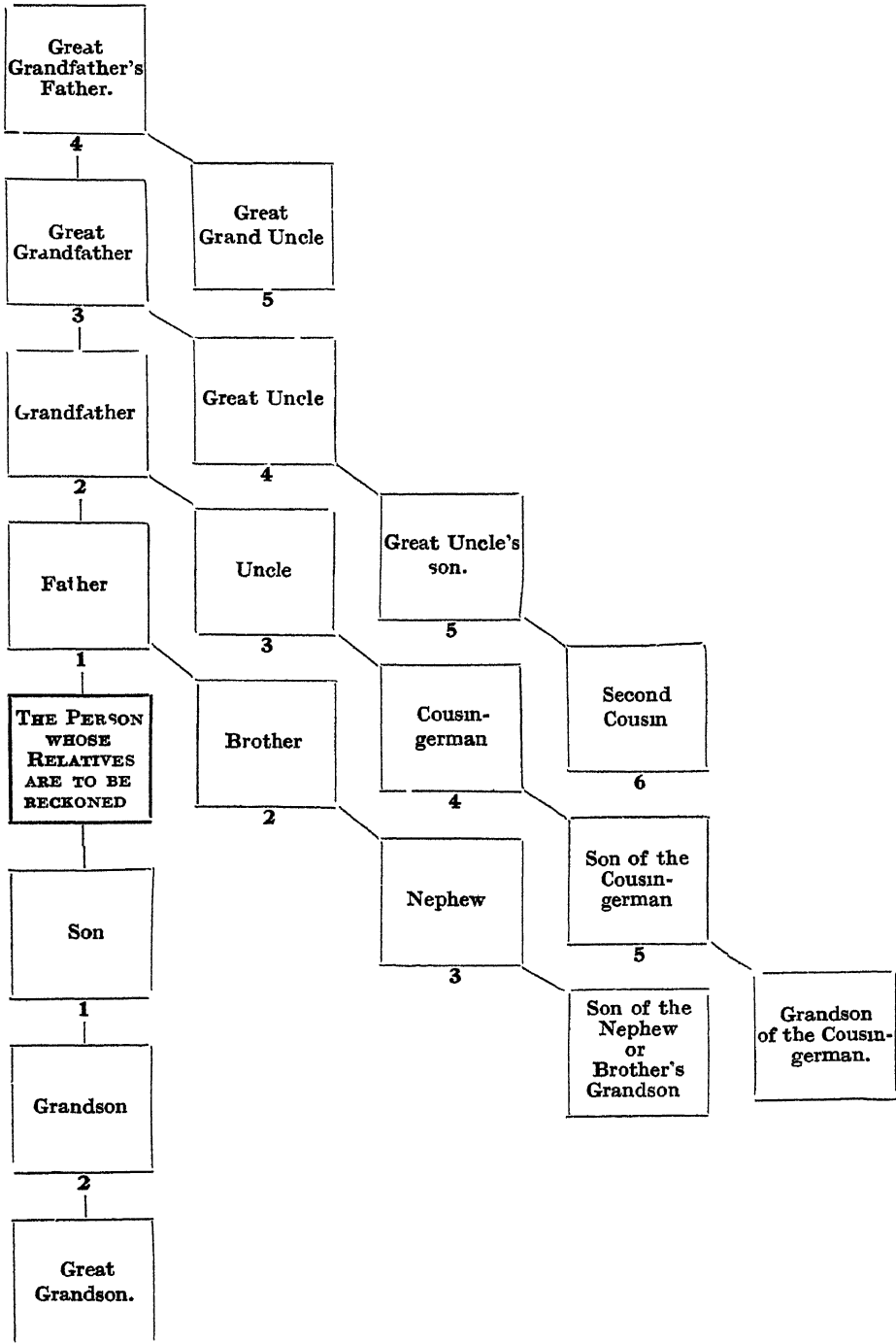
(See Act I of 1938 sec. 2 and Schedule).

SCHEDULE I.

SCHEDULE I.

(See section 28.)

TABLE OF CONSANGUINITY.



SCHEDULE II.

PART I.

(See Section 55.)

- (1) Brothers and sisters, and the children or lineal descendants of such of them as shall have predeceased the intestate.
- (2) Grandfather and grandmother.
- (3) Grandfather's sons and daughters, and the lineal descendants of such of them as have predeceased the intestate.
- (4) Great-grandfather and great-grandmother.
- (5) Great-grandfather's sons and daughters and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(See Section 56.)

- (1) Father and mother.
- (2) Brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.
- (3) Paternal grandfather and paternal grandmother.
- (4) Children of the paternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.
- (5) Paternal grandfather's father and mother.
- (6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.
- (7) Brothers and sisters by the mother's side and the lineal descendants of such of them as have predeceased the intestate.
- (8) Maternal grandfather and maternal grandmother.
- (9) Children of the maternal grandfather, and the lineal descendants of such of them as have predeceased the intestate.
- (10) Son's widow, if she has not re-married at or before the death of the intestate.
- (11) Brother's widow, if she has not re-married at or before the death of the intestate.
- (12) Paternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.
- (13) Maternal grandfather's son's widow, if she has not re-married at or before the death of the intestate.
- (14) Widowers of the intestate's deceased daughters if they have not re-married at or before the death of the intestate.
- (15) Maternal grandfather's father and mother.

(16) Children of the maternal grandfather's father, and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father, and the lineal descendants of such of them as have predeceased the intestate.

SCHEDULE III.

(See Section 57.)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, ¹[117], 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 and 190.

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by marriage or" shall be omitted.

5. In applying any of the following sections, namely sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

¹These figures were inserted by s. 14 of the Transfer of Property (Amendment) Supplementary Act, 1929 (XXI of 1929.)

SCHEDULE IV.

[See section 274 (2).]

FORM OF CERTIFICATE.

I, A. B., Registrar (*or as the case may be*) of the High Court of Judicature at _____ (*or as the case may be*) hereby certify that on the _____ day of _____, the High Court of Judicature at _____ (*or as the case may be*) granted probate of the will (*or letters of administration of the estate*) of C.D., late of _____, deceased, to E. F. of _____ and G. H. of _____, and that such probate (*or letters*) has (*or have*) effect over all the property of the deceased throughout the whole of British India.

SCHEDULE V.

[See section 284 (4).]

FORM OF CAVEAT.

Let nothing be done in the matter of the estate of A. B., late of _____ deceased, who died on the _____ day of _____ at _____, without notice to C. D. of _____.

SCHEDULE VI.

(See Section 289.)

FORM OF PROBATE.

I, _____, Judge of the District of _____ [*or delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)*], hereby make known that on the _____ day of _____ in the year _____, the last will of _____, late of _____, a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to _____, the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VII

(See section 290.)

FORM OF LETTERS OF ADMINISTRATION.

I, _____, Judge of the District of _____ [*or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)*], hereby make known that on the _____ day of _____ letters of administration (with or

without the will annexed, as the case may be), of the property and credits of
 , late of , deceased, were granted to
 the father (or as the case may be) of the deceased, he having undertaken to
 administer the same and to make a full and true inventory of the said property
 and credits and exhibit the same in this Court within six months from the date
 of this grant or within such further time as the Court may, from time to time,
 appoint, and also to render to this Court a true account of the said property and
 credits within one year from the same date, or within such further time as the
 Court may, from time to time, appoint.

SCHEDULE VIII.

(See section 377.)

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To *A. B.*

Whereas you applied on the day of for a certificate
 under Part X of the Indian Succession Act, 1925, in respect of the following debts
 and securities, namely :—

Debts.

Serial number.	Number of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	Description			Market-value of security on date of application for certificate.
	Distinguish- ing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this day of

District Judge.

In the Court of

On the application of *A. B.* made to me on the day of ,
I hereby extend this certificate to the following debts and securities, namely :—

Debts.

Serial number	Number of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	Description.			Market-value of security on date of application for extension.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This extension empowers *A. B.* to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities].

Dated this day of

District Judge.

SCHEDULE IX.

Enactments repealed. Repealed by s. 2 and Sch. of Act XII of 1927.

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